Hastings Law Journal

Volume 65 | Issue 4 Article 4

5-2014

Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation

Andrew Jay McClurg

Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation

ANDREW JAY MCCLURG*

With seventy-eight million baby boomers in or nearing retirement, elder financial exploitation has been labeled the "Crime of the 21st Century," yet little has been done to address the problem. While states and the federal government have passed hundreds of laws protecting children based on the assumption they are vulnerable and unable to protect themselves, older at-risk adults have been comparatively ignored despite extensive research showing they too are vulnerable.

A substantial roadblock to prosecuting elder financial predators is the inability to prove that the financial transfers at issue were the result of exploitation rather than legitimate transactions. Many victims "voluntarily" part with their assets. To outsiders, the transfers may look like gifts or loans when in fact they occur because of undue influence, psychological manipulation, and misrepresentation. Even when property is taken by stealth, the incapacity or death of the victim often precludes prosecutors from being able to prove that the transfers were not legitimate.

This Article proposes the adoption of state criminal statutes that create a permissive presumption of exploitation with regard to certain financial transfers from elders. The Article offers a specific statute and explains how it would be workable and constitutional. Preliminarily, the Article explores the scope of elder financial exploitation, discusses why it is grossly underreported and under-prosecuted, and analyzes practical, cognitive, and psychological reasons why older adults are vulnerable, focusing on emerging research showing that even elders who lack obvious impairments are at risk.

---

* Professor and Herbert Herff Chair of Excellence in Law, University of Memphis Cecil C. Humphreys School of Law. My thanks to Professors Lynda Wray Black, Donna Harkness, Barbara Kritchevsky, Steven J. Mulroy, and Katherine T. Schaffzin, Judge Karen Cole, research assistant Brittney L. Rummells, reference librarian Whitney A. Curtis, and faculty assistant Linda H. Hayes for their valuable help. I am especially thankful to my sister, Robin L. Taylor, for her aid and encouragement in pursuing this Article. We are both indebted to Detective Edward Goldbach and Assistant State Attorney Richard Sherman, Broward County, Florida, for investigating and prosecuting our father's elder exploitation case that is described in this Article. Mr. Sherman graciously provided copies of court and other case documents.

Table of Contents

Introduction

A ninety-three-year-old man takes a walk in his South Florida neighborhood, using a cane for assistance. A year earlier he lost his wife of thirty-five years to cancer. He lives alone. His children live out of state.

A thirty-eight-year-old woman approaches him near his house and strikes up a conversation, asking for directions to the nearest hospital. She suggests they meet sometime for coffee. A week later she calls him although the man does not recall giving the woman his phone number. She begins visiting him at his house, showing him attention and affection.

During one of these visits she tells the man she has cancer and needs surgery but that the hospital will not treat her unless it is paid up front and in full. She states that the surgery will cost approximately $15,000. The man begins loaning her money. She continues asking for more money, saying it is needed for more medical treatment. He gives it to her.

The woman tells the man she owns an apartment building in New York that she is selling and will be able to pay him back when that transaction occurs, but refuses to provide the building address. As time passes she tells the man she is free of cancer but now needs money for her sick grandmother and son. She assures him she is a single woman and that the man she lives with is her brother, but official records show that he is her husband. The course of dealing between the young woman and the old man continues until, during a ten-month period, the man, who lives on Social Security, transfers $60,000 to her.

The above story is common, but in this case the man was our father, Donald McClurg.[1] The above facts were included in the probable cause affidavit filed in support of the complaint[2] charging the exploiter with a second degree felony of elder exploitation to which she pled guilty in December 2012 and paid $50,000 in restitution.[3] The affidavit concluded: "The lies and fictitious stories [the Defendant] continually tells Mr. McClurg are clearly designed to prey on his affections and loneliness for the sole purpose of stealing Mr. McClurg's money. This detective, relying on experience and training, clearly views this incident as a classic 'sweetheart scam.'"[4]

"Sweetheart scams"[5] are particularly cruel crimes because they involve exploiting the known vulnerabilities of elders[6] to steal not only

---

1. In this Article, "our" and "we" refer to my sister, Robin Taylor, and me. Robin is a lawyer and former prosecutor. Don's third child, our brother Douglas, was a bankruptcy lawyer who died in a 2002 accident.

2. *See* Complaint Affidavit, Offense Rep. 33-11-1009257 (Fla. 17th Cir. Ct., Broward Cnty., June 22, 2011) (on file with Author) (setting forth these and other facts concerning the case as part of the Probable Cause Affidavit contained therein).

3. *See* Case Summ., State of Florida v. Williams, Case No. 11010657CF10A (Fla. 17th Cir. Ct., Broward Cnty.) (on file with Author) (showing, on an undated document, the disposition entered on second degree felony of elder exploitation under FLA. STAT. § 825.103(2)(b)) (on file with Author); Deposited Item Details, Wells Fargo Online, Dec. 4. 2012, Deposit #5931988736 (providing a copy of the restitution check in the amount of $50,000); Cir. Ct. Disposition Order in and for Broward Cnty., Fla., Case No. 11010657CF10A (Fla. 17th Cir. Ct., Broward Cnty., Dec. 4., 2012) (on file with Author) (showing change of plea by defendant to "Guilty" and that she was adjudicated guilty on one count, incarcerated for the two days between her arrest and release on bail, and ordered to pay a $1500 fine and court costs).

4. Complaint Affidavit, *supra* note 2. Because the purpose of including my father's story is to impart understanding of the issues, I have opted to refer to the perpetrator throughout this Article as "the Defendant" rather than by name.

5. Legal literature regarding sweetheart scams is almost nonexistent. As of this writing, the term "sweetheart scam" is mentioned in only four sources in Westlaw's legal periodical database, and none of these sources address the term in detail. A search of the Westlaw TP-All database for "sweetheart scam" on March 16, 2014 turned up these four sources mentioning the term: 23 KY. PRAC. KY. ELDER

their financial assets, but their hearts, pride, and dignity. They are but one type of elder financial exploitation, which, already widespread and with seventy-eight million baby boomers in or nearing retirement,[7] has been labeled the "Crime of the 21st Century."[8]

Elder financial exploitation is "underreported, under-recognized, and under-prosecuted."[9] Our father, Don, was one of the "lucky" victims in that his case was investigated and successfully prosecuted thanks to an aggressive detective and determined prosecutor. Most victims are not so fortunate.[10] But he recovered only a portion of his assets in restitution[11]

LAW *Exploitation* § 15:9 (2013); Russell W. Jacobs, *Copyright Fraud in the Internet Age: Copyright Management Information for Non-Digital Works Under the Digital Millennium Copyright Act*, 13 COLUM. SCI. & TECH. L. REV. 97, 148 (2011); Alex Ginsberg, Note, *Hate is Enough: How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599, 1626 n.145 (2011); Lori A. Stiegel, Nat'l Academy of Elder Law Att'ys, Inc., *Financial Abuse: How it May Impact Your Client and Your Practice*, 2011 NAELA Inst. 9-1 (2001).

Reports of sweetheart scams bear eerie similarities. Compare the following general description of how sweetheart scams operate with the factual recitation of our father's case: "The scam typically involves a woman in her late 20s to late 40s approaching a man 60 or older and striking up a friendly conversation, which then leads to a date . . . . She seduces him, leads him to believe a relationship is developing, then opens up about a financial quandary, like a medical procedure or a tuition payment." Kristen Schorsch, *'Sweethearts' Scamming Men Out of Money*, CHI. TRIB. (June 9, 2011), http://articles.chicagotribune.com/2011-06-09/news/ct-met-sweetheart-scams-20110609_1_sweetheart-scams-mothers-and-daughters-older-men.

6. There is some dispute regarding the proper terminology to use when referring to older people. Controversy arises because of concern that some terminology perpetuates or promotes negative stereotypes. Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings*, *in* ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 382, 382 n.1 (Nat'l Research Council ed., 2003). This Article uses the terms "elder," "elderly," and "older adults" interchangeably. Hafemeister noted that "elder" and "elderly" are commonly used in legislation on the subject of elder abuse and exploitation. *Id.* There has been some legislative movement in recent years to abandon age-related terms and include elders in the all-encompassing term "vulnerable adult." *See, e.g.*, S.B. 1222, 2013 Leg., Gen. Sess. (Fla. 2013) (proposing numerous amendments to Florida's elder exploitation legislation, including substitution of the term "vulnerable adult" for "elderly person or disabled adult").

7. *See* U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF BABY BOOMERS 42 TO 60 YEARS OLD IN 2006 at 6 (2009) (stating that the baby boom generation includes the population born between 1946 and 1964 and that in 2006 it was estimated to include 77,980,296 people).

8. METLIFE MATURE MKT. INST., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS 5 (2011) [hereinafter METLIFE STUDY OF ELDER FINANCIAL ABUSE]. This study, a follow-up to a 2009 study, was prepared in collaboration with the National Committee for the Prevention of Elder Abuse and researchers at Virginia Tech University and the University of Kentucky. *Id.* at 2.

9. *Id.* at 4.

10. *See infra* notes 115–133 and accompanying text (discussing rarity of successful elder fraud prosecutions).

11. He received $50,000 in restitution. *See supra* note 3 and accompanying text. Although the precise amount was never determined, we estimated that he transferred approximately $90,000 to the Defendant. The sum is greater than the $60,000 stated in the probable cause affidavit because our father routinely understated the amounts and continued to transfer money to the Defendant after the probable cause affidavit was filed. This is a common, complicating fact pattern in elder fraud financial exploitation cases. *See* Lisa Nerenberg, *Forgotten Victims of Financial Crime and Abuse: Facing the Challenge*, J. ELDER ABUSE & NEGLECT, Aug. 2000, at 49, 51–53 (stating that one common obstacle to

and the incident left him psychologically and emotionally damaged. Like most people, I understood little of the nature or prevalence of elder financial exploitation until our father's case. Dealing with his ordeal opened my eyes to the fact that our legal and social welfare systems are unequipped to adequately protect elders from predators.

Despite substantial evidence that elder abuse and exploitation of all types is widespread and increasing,[12] and research showing that many elders are susceptible to exploitation for reasons associated with aging,[13] too little is being done to address the problem. While states and the federal government have passed hundreds of laws protecting children based on the assumption that they are vulnerable and unable to protect themselves,[14] older at-risk adults have been comparatively ignored even though they are vulnerable for some of the same reasons.[15] The federal Elder Justice Act of 2010, hailed as a milestone achievement in elder abuse protection and prevention,[16] accomplished little more than setting

---

prosecuting elder financial exploitation is that suspects continue to exercise control over the victims while the investigation is ongoing with the risk that their assets will be depleted by the time the case is prosecuted).

12. *See infra* notes 32–33, 107–110 and accompanying text.

13. *See infra* notes 41–106 and accompanying text.

14. *See* Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227, 1245 (2007) (quoting social critic Neil Postman in discussing the fact that beginning in the 1850s, hundreds of laws were passed to protect children based on the assumption that they are "qualitatively different from adults"); *see also* James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 409 (2008) (stating that since the mid-1990s, Congress has passed several laws designed to protect children); Nicole A. Saharsky, Note, *Consistency as a Constitutional Value: A Comparative Look at Age in Abortion and Death Penalty Jurisprudence*, 85 MINN. L. REV. 1119, 1120–21 (2001) (stating that many laws have been passed to protect children and listing examples).

15. *See* Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STAN. L. & POL'Y REV. 175, 176 (2003) (asserting that the United States has much more comprehensive systems for addressing child mistreatment than for addressing elder mistreatment, that many factors related to child mistreatment are also present in elder mistreatment, and that policymakers should look to child protection systems to enhance elder protection). This is not to equate children and older adults, which would be insulting to older adults, but research shows that the two groups are vulnerable for some of the same reasons in terms of cognitive functioning. For example, research has shown similarities between young children and elders in problem solving, memory encoding, and retrieval abilities. *See* Deborah Roedder John & Catherine A. Cole, *Age Differences in Information Processing: Understanding Deficits in Young and Elderly Consumers*, 13 J. CONSUMER RES. 297, 298 (1986) (discussing problem solving); *id.* at 299–399 (discussing memory).

16. *See, e.g.*, *Strengthening our Commitment to Minnesota Seniors: Promoting Independent Living Through the Older Americans Act Reauthorization: Hearing Before the Spec. Comm. on Aging*, 111th Cong. 39 (2010) (statement of Iris C. Freeman, Associate Director, Center for Elder Justice & Policy, William Mitchell College of Law) ("Passage of the Elder Justice Act was a great milestone."); *The 2010 Retrospective: An Eventful Year*, NAT'L CTR. ON ELDER ABUSE E-NEWS, Dec. 2010, at 1 (characterizing the Elder Justice Act as "a tremendous milestone in terms of public policy regarding elder mistreatment").

up councils and advisory boards to study and report on the problem.[17] It is a good step, but the law has no teeth.[18]

Much needs to be done to prevent and disrupt elder financial exploitation.[19] This Article focuses on making it easier to successfully prosecute offenders, both to assure justice to individual victims and provide a deterrent to abuse. As discussed herein, elder exploiters commit their crimes in part because they accurately view the chances of being detected and successfully prosecuted as minimal.[20]

By their nature, elder exploitation cases do not involve situations in which perpetrators conk their victims on the head and steal their wallets. Many victims are tricked or deceived into "voluntarily" parting with their assets. To outsiders, the transfers may look like gifts or loans, when in fact they occur because of undue influence, psychological manipulation, and misrepresentation. Even when property is taken by stealth, the incapacity or death of the victim often prevents prosecutors from being able to prove that the transfers were the result of theft or exploitation.

Researchers and commentators agree that this is one of the primary hindrances to prosecution: the inability of prosecutors to prove that the

---

17. The Elder Justice Act of 2010 was enacted as part of the Patient Protection and Affordable Care Act. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Act established an Elder Justice Coordinating Council ("Council"), comprising the Secretary of the Department of Health and Human Services, the Attorney General, and the heads of governmental entities with responsibilities related to elder mistreatment. 42 U.S.C. § 1397k(a)–(b) (2010). The Council will meet twice a year and make recommendations regarding the coordination of activities of federal, state, local, and private agencies and entities relating to elder abuse, neglect, and exploitation. *Id.* § 1397k(e)–(f)(1). Every two years, the Council is to submit a report describing the activities of the Council and make recommendations for legislation. *Id.* § 1397k(f)(2).

The Act also established the Advisory Board on Elder Abuse, Neglect, and Exploitation (the "Advisory Board") to develop multidisciplinary strategic plans regarding elder justice and make recommendations to the Council. *Id.* § 1397k-1(a). The Advisory Board is required to prepare annual reports and make recommendations regarding elder justice programs, modifications in laws and regulations, and effective methods for collecting national data regarding elder justice and mistreatment. *Id.* § 1397k-1(f)(3). The Act calls for federal grants to eligible entities, including states, for a variety of purposes related to studying and preventing elder abuse, neglect, and exploitation. *Id.* §§ 1397*l*(a)–1397m-1(c). It also calls for the establishment of a National Training Institute for federal and state surveyors to provide training to surveyors to investigate mistreatment of elders in long term care facilities. *Id.* § 1395i-3a(1)(A).

18. A subsequent federal act called the Elder Abuse Victims Act of 2011 died in the House and Senate Judiciary Committees. S. 462, 112th Cong. (2011); H.R. 2564, 112th Cong. (2011). While these bills also lacked enforcement provisions, they were aimed directly at aiding states in identifying and prosecuting elder abusers and exploiters. The goal of the act was to encourage states to create jobs designed to hold those who abuse or exploit elders accountable and promote better research and data collection regarding elder abuse and exploitation to ensure greater efficacy and efficiency in attacking the problem. The House bill was reintroduced in 2013. H.R. 861, 113th Cong. (2013). GovTrack gave it a seven percent chance of making it out of committee and a two percent chance of being enacted. *H.R. 861: Elder Abuse Victims Act of 2013*, GovTrack, http://www.govtrack.us/congress/bills/113/hr861 (last visited Apr. 24, 2014).

19. *See infra* notes 258–265 and accompanying text (discussing some preventative measures).

20. *See infra* notes 50–55 and accompanying text.

financial transfers at issue were the fruits of exploitation rather than gifts, loans, or other legitimate transactions.[21] Speaking in the context of sweetheart scams, one fraud investigator identified the problem as "the dirty word called CONSENT."[22] Proving exploitation in any type of elder fraud case is complicated because the transactions usually occur in secret and victims may make poor witnesses due to cognitive or other impairments, or because they refuse to cooperate with authorities.[23]

This Article proposes the adoption of state criminal statutes that create a permissive presumption of exploitation with regard to certain financial conveyances from elders to non-relatives.[24] It sets forth a detailed statute intended as a conceptual framework for states to use in fashioning a permissive presumption statute that fits within their existing elder protection legislative schemes. The Article includes references to our father's case at points to add context, insights and a human face to the issues discussed.

Part I explores the scope of elder financial exploitation and examines practical, cognitive, and psychological explanations for why older adults are unusually susceptible to exploitation, focusing on emerging research showing that even elders who lack obvious physical or cognitive impairments can be at risk. Part II explains why elder financial crimes are grossly underreported and under-prosecuted. Part III sets forth the proposal for the permissive presumption statute mentioned above, prefaced by a discussion of the need and justification for a presumption approach and an analysis showing the proposed presumption is constitutionally sound under Supreme Court authority. The Conclusion offers brief closing remarks.

---

21. *See, e.g.*, Kendon J. Conrad et al., *Self-Report Measure of Financial Exploitation of Older Adults*, 50 GERONTOLOGIST 758, 758–59 ("Differentiating [financial exploitation] from legitimate transactions is challenging in that there may be indications of consent by the older adult, for example, a signed document and an apparent gift, when in fact the perpetrator has used psychological manipulation or misrepresentation."); Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 291 (2003) [hereinafter Dessin, *Is the Solution a Problem?*] (stating "the lack of consent issue" is often "central in an exploitation case"); Hafemeister, *supra* note 6, at 420–21 ("Evaluating whether financial abuse occurred often requires complex and subjective determinations to distinguish between acceptable transactions and exploitative conduct and separate misconduct from mismanagement.").

22. *Sweetheart Swindles*, FRAUDTECH, http://www.fraudtech.org/sweetheart_scam.htm (last visited Apr. 24, 2014). Fraudtech.org is an anti-fraud website written by retired law enforcement officer Dennis Marlock. *FraudTech's World of Cons, Frauds and Other Lies*, FRAUDTECH, http://www.fraudtech.org (last visited Apr. 24, 2014) (describing author's background as a detective in the Milwaukee Police Department).

23. *See infra* notes 45–46, 117–121, 130–132 and accompanying text.

24. Unfortunately, a significant percentage of elder fraud exploitation occurs at the hands of relatives. *See infra* text accompanying note 33. Exploitation by relatives would not be addressed by my proposal because, as explained in Part III, a presumption statute intended to apply to relatives most likely would fail to pass constitutional muster. *See infra* note 231 and accompanying text.

I. THE SCOPE OF ELDER FINANCIAL EXPLOITATION AND REASONS ELDERS ARE VULNERABLE

> "It is an article of faith in this business to go after the old folks."[25]

Elder financial exploitation is defined broadly as "the illegal or improper use of an elder's funds, property, or assets."[26] The 2010 Elder Justice Act defines it as "the fraudulent or otherwise illegal, unauthorized, or improper act or process of . . . us[ing] the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets."[27] All states now have laws addressing the abuse and exploitation of the elderly.[28] Many state statutes specifically protect elders, while some encompass the broader category of "vulnerable adults."[29] The state statutes incorporate similar themes but vary widely in their language.[30]

Although the true scope of elder financial exploitation is unknown due to underreporting,[31] a 2011 study by the MetLife Mature Market Institute, in conjunction with non-profit and educational partners, estimated the annual loss by victims to be at least $2.9 billion, a 12%

---

25. Eun-Jin Kim & Loren Geistfeld, *What Makes Older Adults Vulnerable to Exploitation or Abuse?*, 13 FORUM FOR FAMILY & CONSUMER ISSUES, no. 1, Spring 2008, *available at* http://ncsu.edu/ffci/publications/2008/v13-n1-2008-spring/Kim-Geistfeld.php (quoting self-identified elder con artist).

26. NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUMAN SERVS. ASS'N, THE NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT 3-3 (1998) [hereinafter 1998 NATIONAL ELDER ABUSE INCIDENCE STUDY].

27. 42 U.S.C. § 1397(j)(8) (2010).

28. 50 STATE STATUTORY SURVEYS: FAMILY LAW: ADULT CARE, PHYSICAL AND FINANCIAL ABUSE OF THE ELDERLY, 0080 Surveys 1 (West 2012) (citing to statutes of all fifty states).

29. *Id.* (noting this differentiation).

30. *See, e.g.*, FLA. STAT. § 825.103 (2013) (defining elder exploitation as knowingly obtaining by deception or intimidation an elderly person's assets with the intent to deprive the elderly person of the assets by a person in a position of trust with the elderly person, or who has a business relationship with the elderly person, or who knows or reasonably should know that the elderly person lacks the capacity to consent, or who breaches a fiduciary duty to an elderly person); N.Y. SOC. SERV. LAW § 473(6)(g) (McKinney 2013) (defining financial exploitation of adults unable to protect themselves as the improper use of such an adult's funds or other property by fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, or coerced property transfers or denial of access to assets); TEX. HUM. RES. CODE ANN. § 48.002(a)(3) (West 2013) (defining elder exploitation as the illegal or improper act of an individual who has an ongoing relationship with an elderly person that involves using the resources of the elderly person for monetary or personal benefit without the informed consent of the elderly person); WASH. REV. CODE § 74.34.020(6) (2013) (defining financial exploitation of a vulnerable adult as the illegal or improper use, control over, or withholding of assets of the vulnerable adult by a person for any person's or entity's benefit other than the vulnerable adult's); *see also* Dessin, *Is the Solution a Problem?*, *supra* note 21, at 270 (asserting that although the state statutes share common themes, "[i]t is virtually impossible to generalize a definition of 'exploitation' from the various states' definitions").

31. *See infra* notes 107–114 and accompanying text.

increase since 2008.[32] Fifty-one percent of the incidents considered in the study were perpetrated by strangers, 34% by family members, friends, and neighbors, 12% by businesses, and 4% through Medicare/Medicaid fraud.[33]

The 1998 National Elder Abuse Incidence Study found that 48% of the victims of elder financial exploitation were eighty years old or older and an additional 28.7% were between ages seventy-five and seventy-nine.[34] Thus, more than 75% of all victims were age seventy-five or older, the "oldest old" as one researcher described them.[35] Similarly, the MetLife study found that the "highest number of victims were in the 80 to 89 age range."[36] The 2009 National Elder Mistreatment Study suggested that a greater percentage of elders under age seventy were victims of financial exploitation by strangers than those over age seventy, but that aspect of the study suffered from a methodological flaw because it asked about lifetime rather than recent experiences.[37]

The MetLife study found that most victims of elder financial exploitation are women,[38] which is consistent with other data.[39] Victimization rates have been found to be significantly higher for African Americans than other racial groups.[40]

---

32. METLIFE STUDY OF ELDER FINANCIAL ABUSE, *supra* note 8, at 2. This estimate was arrived at by analyzing a newsfeed collection maintained by the National Center on Elder Abuse of media reports of all types of elder financial abuse over a three-month period from April through June 2010. *Id.* at 7. The newsfeed analysis showed losses of $530,476,743. No amounts were included in thirty-six percent of the reports. *Id.* The $2.9 billion annual figure was obtained by assuming and extrapolating that unreported losses were equivalent to reported losses. *Id.* As with all research, studies of elder fraud have limitations. Readers should consult the original sources cited in this Article for explanation of the methodologies and limitations.

33. *Id*.

34. 1998 NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 26, at 4–13.

35. Hafemeister, *supra* note 6, at 394.

36. METLIFE STUDY OF ELDER FINANCIAL ABUSE, *supra* note 8, at 8.

37. In a random-digit-dialing telephone survey of persons over age sixty, the National Elder Mistreatment Study found that 7.8% of participants aged sixty through seventy were financially victimized by strangers at some point in their life whereas 5.2% of participants aged seventy-one or older had been financially victimized by strangers. *See* RON ACIERNO ET AL., THE NATIONAL ELDER MISTREATMENT STUDY 57 (2009). But unlike other abuse questions in the study, which focused on past-year experiences, the financial exploitation question asked about lifetime experiences, calling the finding into question. *See id.* at 5 (stating that survey inquiries were based on past-year prevalence, except for financial exploitation by non-family members, which was based on lifetime experiences).

38. METLIFE STUDY OF ELDER FINANCIAL ABUSE, *supra* note 8, at 8 (finding that in 2010 there were nearly twice as many female as male victims in media reports). Reasons for the larger number of female victims include the actuarial explanation that women live longer than men, women may be perceived by perpetrators as weaker and more vulnerable, and many elderly women may never have handled their own financial affairs. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 221 (2000).

39. 1998 NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 26, at 4–17 (stating that women comprise sixty-three percent of elder financial exploitation victims although they make up only fifty-seven percent of the elder population).

40. Scott R. Beach, *Financial Exploitation and Psychological Mistreatment Among Older Adults: Differences Between African Americans and Non-African Americans in a Population-Based Survey*,

A complex web of reasons explains why elders are prime targets for financial exploitation. Some are simple and practical, but the more difficult reasons, not only difficult to address but to comprehend when fashioning solutions, are grounded in cognition and psychology. The Subparts below explore all three categories,[41] focusing on emerging research showing that even elders of seemingly normal mental capacity are vulnerable.

A. Practical Explanations

One simple practical explanation for elder financial exploitation is that older people hold most of the household wealth in this country. People ages sixty-five and above account for nearly $15 trillion in assets, seventy percent of total household net worth.[42] People who own their own homes are said to be more likely to be exploited.[43] Testifying before a U.S. Senate committee investigating elder financial exploitation, a convicted elder exploiter stated that one reason elders make good targets is because they "save their money more than younger people."[44]

Another practically grounded risk factor for exploitation is that elders are often physically and socially isolated.[45] Many live alone, having outlived their partners and friends. Their isolation gives perpetrators free rein to influence them and gain access to their private affairs without outside scrutiny.[46] A closely related psychological risk factor is that social and physical isolation also brings loneliness,[47] which in elders is often

---

50 Gerontologist 744, 756 (2010) (reporting significantly higher exploitation rates for African-American elders than for other racial groups).

41. This discussion is not intended to be exhaustive. Risk factors exist other than those described in these Subparts.

42. Jim Hanson, *Seniors Get Fleeced Out of Billions of Dollars Every Year—And Most of It Goes Unreported*, Credit Union Mag., Nov. 2009, at 29, 29.

43. Donna J. Rabiner et al., *Financial Exploitation of Older Persons: Challenges and Opportunities to Identify, Prevent, and Address It in the United States*, J. Aging & Soc. Pol'y, Aug. 2006, at 47, 53.

44. *Schemer, Scammers & Sweetheart Deals: Financial Predators of the Elderly: Hearing Before the S. Spec. Comm. on Aging*, 107th Cong. 19 (May 20, 2002) (testimony by incarcerated elder exploiter) [hereinafter *Schemer, Scammers & Sweetheart Deals Hearing*].

45. Hafemeister, *supra* note 6, at 393.

46. *Id.* (stating that when the elder lives alone, perpetrators are shielded from scrutiny). *See* Interview by Detective Edward Goldbach with Donald McClurg, in Hollywood, Fla., at 6 (Jan. 27, 2011) (on file with Author) (establishing that nearly all of the meetings between our father and the Defendant occurred in his home when only the two of them were present).

47. *See Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 31 (testimony by incarcerated elder exploiter that the "[t]he main target . . . is an elderly person who lives alone" and that one reason elders are a "good target" is that "[t]hey are very lonely and want someone to talk to"); *see also infra* notes 100–106 and accompanying text (describing psychological vulnerability of elders due in part to need for affection).

accentuated by the recent loss of a loved one.[48] With respect to the latter, exploiters often aim their "pitch" at known vulnerabilities of the victim.[49]

From the perpetrators' standpoint, people who victimize elders accurately believe they are at low risk of detection or prosecution.[50] As explained in Part II, most incidents of elder exploitation are never reported or prosecuted.[51] In a congressional hearing, a Senate committee heard testimony from a relative of an elder fraud victim in a situation in which the perpetrator was suspected in as many as 200 incidents.[52]

Even in the unusual instances when perpetrators are detected and successfully prosecuted, the light penalties are an inadequate deterrent to repeat offenses.[53] Our father's case provides an example. It was by all accounts a successful elder fraud prosecution. The prosecutor said he never handled a case where such a high amount of restitution was paid. But consider the result: the Defendant appropriated an estimated $90,000, pled guilty to a second degree felony, and paid $50,000 in restitution along with a $1500 fine and court costs.[54] She received no jail time other than the two days between her arrest and posting of bail, nor was she sentenced to a term of probation.[55] Mild penalties in elder exploitation cases are grounded in the same reasons that make prosecutions rare to begin with: difficulties of proof due to the secretive

---

48. Rabiner, *supra* note 43, at 49 (listing as risk factors social isolation, loneliness, and loss of a loved one).

49. *See* METLIFE STUDY OF ELDER FINANCIAL ABUSE, *supra* note 8, at 16 (stating that research shows that elder exploiters may tailor their fraud pitches to the psychological needs of the victim). In his initial interview with the investigating detective, our father, whose wife died shortly before the exploitation began, was asked:

> Q. Had you told her about your wife in any of your conversations?
>
> A. Oh, oh yeah. I—think I did, yes. And of course I related to the—to her situation [i.e., the Defendant's claim to have cancer] having gone through a very bad experience with . . . my wife.
>
> Q. Mm-hm.
>
> A. With—with the lung cancer. It was terrible.

Interview by Detective Edward Goldbach with Donald McClurg, *supra* note 46, at 6.

50. Hafemeister, *supra* note 6, at 393 ("[P]erpetrators assume that financial abuse of the elderly is unlikely to result in apprehension or repercussions."). The Defendant in our father's case did not appear concerned with being successfully prosecuted. The probable cause affidavit referenced two other reported elder exploitation incidents that she allegedly perpetrated, for which she was never prosecuted. Complaint Affidavit, *supra* note 2 ("There are two additional police reports filed with this agency concerning [the Defendant] and elderly exploitation.").

51. *See infra* Part II.

52. Witness William Blevins testified on behalf of his cousin Vaughan Blevins "and over 200 others who have been exploited financially by a career con man." *Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 12 (statement of William Blevins, on behalf of Vaughan Blevins, Manassas, VA).

53. Nerenberg, *supra* note 11, at 53 (2000) ("The relatively light sentences that are typically imposed on perpetrators . . . fail to deter perpetrators from re-offending.").

54. *See supra* note 3 (citing court documents containing this information).

55. *Id.*

nature of the transactions and the incapacity or intransigence of the victim, which give defendants strong hands to play when plea bargaining.

B. Cognitive Explanations

The most significant vulnerability factor for elder abuse of all types—the factor that commands exceptional legal treatment of elder abuse—is that advanced age brings with it increased cognitive impairments. Of course, it is important to emphasize that not all elders suffer from cognitive impairment. One study compared the financial decisionmaking between a group of "high functioning neurologically healthy" elders (average age eighty-two) and a group of young adults (average age twenty) and found it to be "remarkably similar."[56]

Nevertheless, as a general proposition, it is fair to say that information processing and memory abilities decline with the passage of time.[57] One researcher administered several standardized tests designed to test a variety of types of reasoning to young adults and older adults, including making logical step progressions, unraveling codes, identifying and explaining similarities in objects or concepts, concept formation, and analyzing puzzles to determine missing pieces.[58] The results showed that the average seventy-year-old performed a full standard deviation level below the average young adult.[59]

Fraud perpetrators are alert to and prey on the cognitive and physical impairments of elders. The MetLife study found that stranger perpetrators target victims who show visible signs of vulnerability "such as handicap tags on cars, the use of a walking cane, or the display of confusion."[60] The study reported the typical victim was an elder "visible to potential perpetrators in the community through activities at banks, grocery stores, churches, or driving around town, and was currently exhibiting some noticeable signs of mild to severe cognitive or physical impairment."[61]

Although much has been written about the cognitive capacity of elders, this Article makes no attempt to thoroughly review the literature. Obviously, if an elder is so impaired that she does not know or understand what she is doing, the person will be vulnerable to predators. More vexing to grasp—and the focus of this Subpart—is why so many

---

56. Stephanie Kovalchik et al., *Aging and Decision Making: A Comparison Between Neurologically Healthy Elderly and Young Individuals*, 58 J. Econ. Behavior & Org. 79, 89 (2005).

57. *Decision Making by the Growing Elderly Population is Uncharted Territory*, Sci. Daily (Apr. 27, 2007), http://www.sciencedaily.com/releases/2007/04/070426093412.htm (quoting University of Oregon Professor Ellen Peters).

58. Timothy A. Salthouse, *Effects of Aging on Reasoning*, *in* Cambridge Handbook of Thinking and Reasoning 589, 589–91 (K.J. Holyoak & R.G. Morrison eds., 2005).

59. *Id.* at 590–91.

60. MetLife Study of Elder Financial Abuse, *supra* note 8, at 10.

61. *Id.* at 8.

elders become victims of financial exploitation and undue influence despite the lack of outwardly obvious severe cognitive impairments.

We tend to think of mental competence as a black or white issue. Someone either is or is not competent. Dealing with our father's case brought the realization that, as researchers recognize, there is a sliding scale of competency or capacity[62] among older adults.[63] They can be competent in their decisionmaking in many aspects but incompetent in others, often subtly so. With respect to undue influence, even qualified neuropsychologists administering competency exams can fail to detect or assess a person's susceptibility,[64] in part because undue influence is a legal concept, not a medical one.[65]

It has been estimated that eleven percent of persons over age sixty-five and thirty-six percent of persons over age eighty-five suffer some degree of dementia.[66] Dementia comes in degrees: it can be overt and obvious or lurking but not readily apparent. Recent studies show that a declining memory, which makes it easier to manipulate an elder, is often the first precursor to dementia.[67] The studies also show that persons suffering cognitive decline in its earliest stages may perform normally on mental tests[68] and be written off by doctors as the "worried well" when they report their failing memories.[69]

---

62. Because of the stigma attached to the term "competent," most modern researchers use the term "capacity" in assessing the decisionmaking capabilities of elders. *Mental Capacity, Consent, and Undue Influence*, NAT'L COMM. FOR THE PREVENTION OF ELDER ABUSE, (2003), http://www.preventelderabuse.org/issues/capacity.html (stating that the term "incompetent" is rarely used by professionals in describing diminished mental abilities and that "capacity" is the preferred term).

63. James J. Lynch, *Mental Capacity and the Older Adult—A Psychiatrist's Perspective*, *in* ROSE MARY BAILLY & ELIZABETH LOEWY, FINANCIAL EXPLOITATION OF THE ELDERLY: LEGAL ISSUES, PREVENTION, PROSECUTION & SOCIAL SERVICE ADVOCACY 10–19 (2007) (discussing in a medical decisionmaking context the fact that there is a sliding scale of competency among elders).

64. Nerenberg, *supra* note 11, at 56 (stating that even mentally competent adults can be subject to undue influence and that neuropsychologists may fail to note susceptibility to undue influence in the course of mental status examinations).

65. Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62B J. GERONTOLOGY: PSYCHOL. SCI. P3, P8 (2007) ("Undue influence is a concept that appears in the law, but is not well defined clinically.").

66. Susan D.M. Kelley, *Prevalent Mental Health Disorders in the Aging Population: Issues of Comorbidity and Functional Disability*, J. REHABILITATION, Apr.–June 2003, at 19, 19. Dementia has been defined as "a syndrome of acquired persistent decline in several realms of cognitive ability including memory, problems with language and math, difficulty [in] problem solving, impaired recognition, and disturbances in planning a sequence of activities such as going to the grocery store or trying to do errands." *Id.* at 20.

67. *See* Marilynn Marchione, *Memory Decline May Be Earliest Sign of Dementia*, ASSOCIATED PRESS, (July 18, 2013), http://news.yahoo.com/memory-decline-may-earliest-sign-dementia-172940009.html (discussing recent studies showing that memory decline may be the earliest sign of dementia).

68. *Id.* (describing several studies showing that people with declining memory may be suffering "subjective cognitive decline" even when they "test normal on mental ability tests").

69. *Id.* ("Doctors often regard people who complain that their memory is slipping as 'the worried well.'").

Assessing the decisionmaking capacity of elders is an area of study that has come into prominence relatively recently. Researchers have noted that different constellations of capacity exist depending on the complexity of the decisionmaking involved.[70] Decisionmaking is a multidimensional process that incorporates several components, including: structuring the problem requiring a decision, understanding relevant information, integrating that information and being able to rationally reason about it, and appreciating the significance of the information and the limits of one's own decision skills.[71]

Emerging research offers explanations as to how and why elders who "appear to be of sound mind and body" are at risk of being financially exploited due to gradual neuroanatomical changes in capacities, such as decisionmaking and memory functions.[72] This was the most baffling aspect of our father's situation. From the outside, he appeared "normal." He could carry on an articulate conversation about the deficiencies in the Miami Heat's game plan against the Celtics the night before, but in the next breath insist that the Defendant's husband was really her brother, "[b]ecause she told me," ignoring documentary evidence to the contrary.[73]

One frequently cited vulnerability factor for elder financial exploitation is that elders are more trusting than younger people.[74] Victims often have an "irrational trust" in perpetrators of elder fraud exploitation.[75] Exploiters of elders specifically target older adults because of their trusting nature.[76] One unscientific explanation for this trust was generational, the suggestion being that older people grew up in an era when people were more trustworthy, but recent research suggests that brain mechanisms are at play.

---

70. Moye & Marson, *supra* note 65, at P3 (explaining that some decisionmaking, such as managing finances, requires a broad set of cognitive skills, while others require a much narrower set of skills).

71. Melissa L. Finucane & Nancy Berman Lees, Decision-Making Competence of Older Adults: Models and Methods 2 (unpublished manuscript), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.116.7585&rep=rep1&type=pdf (setting forth these dimensions of good decisionmaking).

72. *See* Natalie L. Denburg & Lyndsay Harshman, *Why So Many Seniors Get Swindled: Brain Anomalies and Poor Decision-Making in Older Adults*, *in* CEREBRUM 2010: EMERGING IDEAS IN BRAIN SCIENCE 123–31 (2010) (using the language quoted in text and discussing emerging research that helps explain why elders without obvious cognitive conditions such as dementia may still be vulnerable to financial exploitation due to subtle brain anomalies that affect complex decisionmaking).

73. The Complaint Affidavit stated: "[The Defendant] tells Mr. McClurg that the male subject . . . residing with [the Defendant] is her brother. However, this police agency has a domestic violence report numbered 33-1007-122130 made by [the Defendant] in which she refers to [the man] as her husband." *See* Complaint Affidavit, *supra* note 2.

74. Hafemeister, *supra* note 6, at 392.

75. *See* Bryan J. Kemp & Laura A. Mosqueda, *Elder Financial Abuse: An Evaluation Framework and Supporting Evidence*, 53 J. AM. GERIATRICS SOC'Y 1123, 1124 (2005).

76. *See Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 31 (reporting testimony by incarcerated elder exploiter that "[t]he reason the elderly are . . . good target[s] is because they are very trustworthy").

One study showed that older people are less alert to cues of untrustworthiness than younger people. Specifically, the study showed that older adults were less likely to interpret an untrustworthy face as a potentially dishonest person.[77] Researchers showed photographs of faces intentionally selected to look trustworthy, neutral and untrustworthy to young adults (mean age of twenty-three) and older adults (mean age of sixty-eight).[78] Both groups reacted similarly to the trustworthy and neutral faces.[79] With regard to the untrustworthy faces, however, the young adults reacted strongly whereas the older adults saw the faces as trustworthy and approachable.[80]

A second related study used magnetic resonance imaging to map the brain activities of young adults (mean age of thirty-three) and older adults (mean age of sixty-six) as they viewed the facial photos and found that the younger adults showed activation in a portion of the brain called the anterior insula, while the activity in that part of the brain for the older adults was muted.[81] Shelly E. Taylor, the lead researcher in both studies, wrote that the "older adults do not have as strong an anterior insula early-warning signal; their brains are not saying 'be wary,' as the brains of the younger adults are."[82] At this point it is unknown whether this weakened warning signal in elders extends beyond facial impressions to untrustworthiness manifested by overt behavior.

A different study hypothesized that older adults are more vulnerable to fraud because of the deterioration of a part of the brain known as the ventromedial prefrontal cortex.[83] Erik Asp and colleagues set out to investigate the underlying brain mechanisms that cause people to be dubious or skeptical.[84] Previous researchers had determined that aging is linked to a decline in functioning of the prefrontal cortex, and speculated that it may make older adults more vulnerable to misleading information.[85] Asp's study was directed at the specific question of the extent to which the prefrontal cortex works "to prevent credulity and gullibility."[86]

Applying his "False Tagging Theory," Asp hypothesized that deficiencies in the ventromedial portion of the prefrontal cortex caused by

77. *Why Older Adults Become Fraud Victims More Often*, SCI. DAILY (Dec. 3, 2012), http://www.sciencedaily.com/releases/2012/12/121203163430.htm (reporting on two coordinated UCLA studies).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Erik Asp et al., *A Neuropsychological Test of Belief and Doubt: Damage to Ventromedial Prefrontal Cortex Increases Credulity for Misleading Advertising*, FRONTIERS IN NEUROSCIENCE, July 2012, at 1, 1.

84. *Id.*

85. *Id.* at 1–2.

86. *Id*.

injury or aging would create a "doubt deficit," causing people to be more credulous and more likely to believe false or deceptive information.[87] The study involved showing deceptive advertisements to patients with damage to their ventromedial prefrontal cortex.[88] The findings supported the hypothesis that persons suffering diminishment in that part of the brain are more likely to believe misleading and deceptive advertisements.[89] This finding held true even when corrective disclaimers were attached to the ads.[90] The researchers concluded "that vulnerability to misleading information, outright deception, and fraud in older persons is a specific result" of problems caused in the doubting process resulting from impairment of the ventromedial prefrontal cortex through aging.[91]

Another substantial contributor to vulnerability to fraud and exploitation among elders is memory loss.[92] Memory research by Larry Jacoby and associates showed that elders are unusually vulnerable to "misinformation effect," which occurs when false information is imparted to a person after an event that distorts or supplants accurate memory of the original event.[93] Specifically, this study showed, in four experiments, that older adults are ten times more likely to have their accurate memories altered by intervening misleading information.[94]

Our father's diminishing memory made him susceptible to manipulation through misinformation, enabling the Defendant to spin new tales or new versions of old ones whenever previous stories were proved false. A prominent illustration of this pattern involved the various explanations for why she needed money.

---

87. *Id.* at 2 (describing false tagging theory as a belief process in which ideas are initially believed but a secondary assessment tied to the ventromedial portion of the prefrontal cortex can create doubt or disbelief and asserting that the theory predicts that dysfunction in that portion of the brain can "result in a 'doubt deficit,' consequences of which should be credulity and a tendency to believe inaccurate information").

88. *Id.* at 5–6 (describing the test process). The advertisements had all been ruled to be deceptive by the Federal Trade Commission (the "FTC"). One example was an advertisement for "Legacy Luggage," which the FTC ruled was deceptive because it contained the headline "Legacy brings you the finest American Quality luggage." The FTC determined the advertisement was deceptive because the luggage was made in Mexico and only inspected in the United States. *Id.* at 5.

89. *Id.* at 7.

90. *Id.* ("[T]the pattern of credulity results was evident even when the vmPFC [ventromedial prefrontal cortex] patients were given specific information that rebuts the misleading claim.").

91. *Id.* at 9.

92. Larry L. Jacoby et al., *Aging, Subjective Experience, and Cognitive Control: Dramatic False Remembering by Older Adults*, 134 J. EXPERIMENTAL PSYCHOL. 131, 131 (2005) ("A potential consequence of age-related declines in memory is older adults' greater susceptibility to scams.").

93. *Id.* Jacoby's work builds on classic misinformation studies by Elizabeth Loftus, such as her famous experiment in which participants viewed an automobile accident in which a stop sign appeared and were later asked a question implying that a yield sign was present. *Id.* Asked to describe the accident later, participants who were given the false information were much more likely to remember seeing a yield sign than participants in the control group who were not given the misleading information. *Id.*

94. *Id.*

As recited in the probable cause affidavit, the Defendant's initial story was that she had cancer and needed the money for medical treatment.[95] That story kept our dad, a kind, trusting person who had lost his long-time wife to cancer only months earlier, on the hook for an extended period. When the cancer story was finally exposed as false, the Defendant simply switched explanations, saying that she needed money for her sick grandmother and son,[96] and later, for a $5000 piece of sewing equipment that she allegedly needed for her home sewing business[97] and an automobile.[98] Whether because of accessibility bias or faulty memory of the original information,[99] our father would always remember the later distorted information rather than the original events.

C. Psychological Explanations

It is impossible to draw a line between organic cognitive factors such as those described above and the psychological factors that make elders susceptible to exploitation. Many exploited victims may not *want* to understand what is happening to them because they have become dependent on the perpetrator to fulfill unmet social and psychological needs.

Research by Peter A. Lichtenberg and colleagues provides new insights into the "psychological vulnerability"[100] of elders by building on previous research showing that depression and poor social needs fulfillment in aging are associated with financial exploitation.[101]

Lichtenberg cited earlier research showing that three social needs exist throughout life: (1) the need for affection; (2) the need for behavioral confirmation, defined as external affirmation that a person's contributions are useful and valued; and (3) status.[102] While the need for status decreases with age, the need for behavioral confirmation remains

---

95. *See supra* text accompanying note 2.

96. *See id.* (stating that the Defendant "eventually advises Mr. McClurg that she is free of cancer and now needs money for her sick grandmother and son").

97. Interview of Donald McClurg by Detective Edward Goldbach, *supra* note 46, at 18–19 (describing payment to defendant of $5,000 purportedly for a sophisticated piece of sewing equipment).

98. The payment for the automobile occurred at the very end of the exploitation period and is not confirmed by any official record.

99. There are two alternative explanations for misinformation effect on accurate memory when misleading or false information is received between the original event and the attempt at recall: accessibility bias and an inability to accurately recollect the original event. Accessibility bias can occur when people asked about a past event answer with the first information that comes to mind. Jacoby et al., *supra* note 92, at 132. Jacoby found that the young and old are equally affected by accessibility bias, but that older people are at a much greater risk of misinformation effect due to their inability to accurately recollect the original event. *Id.* at 133.

100. *See generally* Peter A. Lichtenberg et al., *Is Psychological Vulnerability Related to the Experience of Fraud in Older Adults?*, 36 Clinical Gerontologist 132 (2013).

101. *Id.* at 134–35.

102. *Id.*

high, and the need for affection actually increases.[103] In his study of a nationally representative sample of 4440 survey participants over age fifty, 4.3% report being the victims of financial fraud, but that victimization prevalence jumps to 14% for those with the highest depression scores and lowest social needs fulfillment.[104] Lichtenberg concluded that "[t]he combination of high depression and low social-needs fulfillment was associated with a 226% increase in fraud prevalence."[105] He is currently working on developing a model for predicting psychological vulnerability to elder financial exploitation.[106]

In many senses, our father—strong, intelligent, college-educated, and extremely frugal—seemed to be a most unlikely victim for exploitation. We certainly thought so. But the research discussed in this Part shows exactly the opposite was true. In retrospect, he was a perfect victim living amidst a perfect storm of practical, cognitive, and psychological risk factors. He lived alone, owned his own home, had recently lost his longtime wife, showed signs of declining memory and reasoning capacity, and suffered depression and low social-needs fulfillment. His story is a cautionary tale to any person—friend, relative, or law enforcement, healthcare, financial services or adult protective services worker—who has the responsibility for or goal of protecting an elder. Anyone who believes their elder parent or other relative is immune to financial predation should think again.

II. The Underreporting and Under-Prosecution of Elder Financial Exploitation

There exists "a wide consensus that elder abuse is greatly underreported."[107] The 1998 National Elder Abuse Incidence Study concluded that "officially reported cases of abuse are only the 'tip of the iceberg.'"[108] The study estimated that only sixteen percent of elder abuse incidents of all types are reported to authorities.[109] A 2009 study found that for every case of elder financial exploitation that gets reported to authorities, nearly forty-four instances are not reported.[110]

---

103. *Id.* at 135.

104. *Id.* at 141.

105. *Id.* at 143–44.

106. Diane C. Lade, *New Study, Bill Puts Focus on Senior Fraud*, Sun-Sentinel (May 26, 2013), http://articles.sun-sentinel.com/2013-05-26/health/fl-senior-fraud-profile-20130523_1_investment-fraud-scams-elders (reporting the results of Lichtenberg's study and stating that he is working on developing a rating scale and checklist for use by healthcare workers, law enforcement, and others for determining when a senior might be at risk for fraud).

107. Hafemeister, *supra* note 6, at 383.

108. 1998 National Elder Abuse Incidence Study, *supra* note 26, at 3.

109. *Id.* at 5-1.

110. Lori A. Stiegel, *An Overview of Elder Financial Exploitation*, 36 Generations: J. Am. Soc'y on Aging 73, 74 (2012) (discussing results of 2009 New York State Elder Abuse Prevalence Study).

The reasons for such low reporting are varied. They often entail physical or cognitive limitations that prevent the person from realizing that she is a victim or make it impossible for her to self-report.[111] Also common, however, are psychological barriers such as embarrassment,[112] self-blame,[113] and accompanying denial. One writer compiled a useful capsule list of reasons for the underreporting of elder financial exploitation:

> [V]ictims are often unable or reluctant to tell anyone they are being exploited, or to seek help for the following reasons: they fail to recognize the exploitation or think it is too late to do anything about it: they are physically or cognitively impaired and cannot report it; they are afraid they won't be believed; there is a stigma about being labeled a victim; they depend upon the perpetrator and fear the loss of that relationship; they are reluctant to get the perpetrator in trouble; they fear the perpetrator will retaliate; or they fear exposure of exploitation will lead to the appointment of a guardian or conservator or cause them to be placed in a long-term-care facility.[114]

Even when reported, successful prosecutions of elder financial exploitation are rare.[115] Many of the same factors that explain underreporting also hinder prosecution.[116]

Many victims suffer from cognitive or physical impairments that prevent them from being dependable witnesses. Prosecutors, in turn, may shy away from cases for fear that the victim will be a "poor witness" or become incapacitated or die before trial.[117] Perpetrators may seek to capitalize on these same deficiencies.

Here we have the nut of the whole matter. Elders are vulnerable to fraud in the first instance in large part because of their mental and physical condition.[118] Those same conditions contribute to a lack of reporting of the crimes.[119] If the crime is reported, those same characteristics make it difficult to successfully prosecute the offender. Because most elder

---

111. Hafemeister, *supra* note 6, at 414 (stating that the elder victims "may not realize that abuse occurred" or "may . . . have an impairment that prevents them from reporting the abuse or from recognizing its existence").

112. *Id.* (stating that reporting is hindered by the fact that elder financial exploitation victims "may be embarrassed").

113. *Id.* ("Because victims are often induced to cooperate in their own exploitation, they may believe that they are fully or partially to blame for their victimization.").

114. Stiegel, *supra* note 110, at 75–76.

115. Hafemeister, *supra* note 6, at 420 ("The successful prosecution of financial abuse of the elderly has been characterized as rare . . . with few prosecutions extending beyond the investigatory phase and most cases being closed due to lack of evidence.").

116. Rabiner et al., *supra* note 43, at 55.

117. Hafemeister, *supra* note 6, at 422 ("Prosecutors may be unwilling to pursue such cases because the elderly may be poor witnesses" because of cognitive impairments such as lack of memory and that "[p]articularly frail victims are likely to decline, become incapacitated, or die during the course of what are often protracted proceedings.").

118. *See supra* notes 56–99 and accompanying text.

119. *See supra* note 111 and accompanying text.

financial exploitation incidents occur in secrecy and isolation,[120] reliable testimony from the victim is often the linchpin to a successful prosecution. There may not be any other direct witnesses because it is common for the exploiter to tell the victim to keep their dealings secret.[121]

Prosecuting elder fraud is also complex and time consuming, frequently involving unraveling and trailing numerous transactions.[122] Investigating and prosecuting elder financial crimes may require familiarity with several diverse areas of law, including contract law, real estate law, guardianship law, and mental capacity.[123] The cases are often beyond the expertise of non-specialized law enforcement officers.[124]

Nor do elder financial crimes top the list of crimes that most law enforcement officers have an interest in taking on. As one fraud investigator said with regard to sweetheart scams, "[m]ost cops would rather investigate a triple ax murder."[125] As complex, resource-sucking property crimes, they are often given low priority status.[126]

Underlying much of the reluctance to prosecute is the difficulty of sorting out and proving that the financial transfers involved in the case were the result of exploitation rather than non-exploitative loans or gifts. This is where the consent/intent issue comes into play. As one insensitive criminal investigator told an elder fraud complainant, it is not a crime for someone to give their money away. The complainant testified before a U.S. Senate committee on aging regarding the obstacles he faced from law enforcement officials when he tried to report the financial exploitation of his elder cousin:

> I interviewed with Fairfax County CID [Criminal Investigation Division] and . . . was told [the victim] made a poor witness because of

120. *See supra* notes 45–46 and accompanying text.

121. *See* Virginia H. Templeton & David N. Kirkman, *Fraud, Vulnerability, and Aging: Case Studies*, 8 ALZHEIMER'S CARE TODAY 265, 273 (2007) (stating that the scammers use a strategy called "blocking the exits" in which they tell victims "that it is a bad idea to mention the transaction to anyone").

122. Hafemeister, *supra* note 6, at 420–21 (offering this explanation as a barrier to prosecution).

123. Nerenberg, *supra* note 11, at 51; *id.* at 51–52 ("Proving financial crimes frequently requires familiarity with such diverse topics as contract law, real estate, guardianship, and mental capacity. Investigators and prosecutors may need to decipher civil contracts and financial documents, prove what victims did and did not understand (often at earlier points in time), and determine what defendants knew or reasonably should have known about victims' levels of understanding. Because these topics are not covered in traditional law enforcement training curricula or programs, few police officers within local precincts, even command staff, possess this expertise. Similarly, prosecutors are unlikely to have received training in these areas. Those officers and prosecutors with this type of expertise are likely to be so inundated with cases that they are forced to prioritize those that involve a large number of victims and large losses. Without training, law enforcement personnel who come into contact with financial crimes are forced to pick up needed skills 'on the run.'").

124. Hafemeister, *supra* note 6, at 421 (stating that investigating and prosecuting financial fraud requires a range of expertise that most police investigators and many prosecutors lack).

125. *Sweetheart Swindles*, *supra* note 22.

126. Nerenberg, *supra* note 11, at 54 (asserting that property crimes are often seen as less serious than violent crimes and that "statistic-driven" law enforcement agencies may give them lower priority).

> his dementia. I was reminded that [the suspect] had certain rights, including the right to face his accuser. My response was the Constitution's guarantee of equal rights and protection for everyone. Let's let a judge and jury decide. I was reminded more than one [sic] that it wasn't a crime for someone to "give their money away." I found and still find this comment unsuitable and demeaning to a victim with diminished capacity.[127]

The investigator's comment was unfortunate, and criticized by the chair of the Senate committee that heard the testimony,[128] but the reality is that distinguishing legitimate transactions from those that are the result of undue influence, psychological manipulation, and/or misrepresentation is the case-killing roadblock that elder fraud investigators face in many situations.[129] When the victim is cognitively impaired by muddled or forgetful thinking, a he says/she says battle of testimony with a typically much younger accused is not a fair fight.

In addition to problems resolving the consent issue stemming from the victim's diminished capacity,[130] many victims refuse to cooperate with and even work against the prosecution to protect the criminal. Their reactions bear a discomfiting similarity to the phenomenon in domestic violence cases in which victims refuse to cooperate and try to "drop the charges." Most states have responded to that issue in domestic violence cases by passing mandatory or preferential "no-drop" statutes that require prosecution even when the victim does not wish to proceed, but similar statutes do not exist for elder exploitation cases.[131] Several commentators have advocated applying a spousal abuse model to elder financial abuse.[132]

As a consequence of these difficulties, friends or relatives who report elder financial fraud to law enforcement are often turned away,

---

127. *Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 17–18 (statement of William Blevins, on behalf of Vaughan Blevins, Manassas, VA).

128. *Id.* at 47–48 (quoting the chairman of the U.S. Senate Special Committee on Aging that heard Blevins' testimony stating that "the most astounding thing that I got from your testimony, that when you first went to . . . the local police . . . that someone said to you, in essence, that it was not a crime for people to give their money away").

129. *See supra* note 21.

130. Hafemeister, *supra* note 6, at 421 (explaining the difficulty of determining consent when the victim suffers from diminished mental capacity).

131. *See generally* Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1836–39 (2011) (discussing no-drop statutes in domestic violence cases, including critiques of such laws).

132. *See* Hafemeister, *supra* note 6, at 408 (making this assertion and listing several commentators who have advanced the argument). *But see id.* at 408–09 (asserting that because the spousal abuse model focuses largely on physical abuse, it does not appear adequate as a comprehensive model for addressing elder financial abuse).

told that the exploitation is a "civil matter" or "family matter" that they must handle on their own.[133]

III. A Statutory Presumption to Prosecute Elder Financial Predators

To help level the playing field and enhance the successful prosecution of elder predators, this Article proposes that states enact statutes that supplement their existing criminal statutes to create a permissive presumption that certain financial transfers from elders to non-relatives were the result of exploitation. The details of the proposal are elaborated on in Subpart C below.[134] Preliminarily, this Part explains the need and justification for a statutory presumption approach, the constitutionality of such an approach, and how it would work procedurally.

A. The Need and Justification for a Presumption Approach

> "These are difficult crimes to prosecute due to the victim frequently being a 'willing' participant."[135]

The Federal Bureau of Investigation ("FBI") agent who made the above statement was testifying before Congress about sweetheart scams of the elderly, but the statement applies more generally to other types of elder fraud exploitation. As previously explained,[136] the difficulty in proving that what may superficially look like voluntary gifts or loans are

---

133. *See Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 37 (statement of retired detective of the Los Angeles Police Department Elder Persons Estate Unit and current elder financial protective services employee) ("[M]any reporting person are automatically misinformed by authorities that it is a civil matter, when in fact they are hidden and silent crimes."); Dessin, *Is the Solution a Problem?*, *supra* note 21, at 291 ("Many law enforcement personnel and prosecutors are . . . reluctant to become involved in [elder financial exploitation] cases either because of a feeling that the cases are better handled in the civil system or because the cases present too many hindrances to effective prosecution."); Nerenberg, *supra* note 11, at 50 ("The lines between criminal conduct and 'civil matters' are often unclear, which sometimes results in law enforcement personnel referring to the civil system cases involving the misuse of civil instruments—such as powers of attorney—even though the conduct may also be criminal."); *Sweetheart Swindles*, *supra* note 22 (stating that many "prosecutors share in this belief and frequently escape having to handle the case by saying 'it's a civil matter.' Too many victims have heard those words, and now feel they have been twice betrayed; once by the con artist, and then by the people who are supposed to protect them from such harm").

This, in fact, was the reaction I initially received upon contacting the Hollywood Police Department by email and phone. The response to my email query stated that "[m]any times in cases like these, you may need to pursue action in court to have yourself or another family member seek the Power of Attorney over your fathers financial matters." Email from Lt. Frank McGarry to Author (Jan. 12, 2011) (on file with Author). The first law enforcement officer I spoke with by phone said more directly that these are often "family matters," about which the police cannot do anything. Fortunately, my call was forwarded to Detective Edward Goldbach, who took on and vigorously pursued the case.

134. *See infra* Part III.C.

135. *See Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, at 57.

136. *See supra* notes 127–129 and accompanying text.

in reality the result of exploitation is a substantial hindrance to prosecution.[137] Exploited elders are frequently unable, and sometimes unwilling, to effectively assist prosecutors.[138]

Hundreds of presumptions exist in American jurisprudence.[139] Several reasons have been offered for creating presumptions in the law. They include fairness, the desire to advance substantive policies, and the need for some device to resolve certain issues that could not otherwise be resolved due to a lack of proof.[140] It is agreed, however, that the strongest justification for most presumptions is the probabilistic determination that the existence of certain facts can be inferred from other facts.[141]

A presumption of elder exploitation when the statutory foundational facts specified in Subpart C below[142]—giving away large sums of money to relative strangers for little or no consideration—is justified on several grounds. In terms of fairness and access to the evidence, the course of dealing between the elder and accused usually takes place in private.[143] Only two people know the facts and the elder is often not available as a witness due to incapacity or death, or the elder will make a poor witness because of cognitive deficiencies such as impaired memory. As explained in Part II, this is a primary reason why police and prosecutors are reluctant to undertake such cases in the first place.[144]

Related to this point, the presumption called for in this Article would advance the substantive policy of prosecuting and deterring elder financial exploitation. One reason that fraud perpetrators single out vulnerable older adults is because they know that the odds are in their favor with respect to escaping prosecution or substantial punishment.[145] Finally, and most important in terms of the rationales underlying presumptions in the law, when elders transfer large sums of money to persons they have known only a short time without receiving reciprocal value in goods or services, it is probable that the transfer was the result of exploitation.[146]

---

137. *See supra* note 21 (citing several sources supporting this assertion).

138. *See supra* notes 117, 130–132 and accompanying text.

139. 2 McCormick on Evidence § 343 (Kenneth S. Broun ed., 7th ed. 2013) (stating that there are "hundreds of recognized presumptions").

140. Roger C. Park et al., Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials § 4.08 (3d ed. 2011) [hereinafter Evidence Law] (listing these reasons).

141. 2 McCormick on Evidence, *supra* note 139, § 343 ("[T]he most important consideration in the creation of presumptions is probability."); Evidence Law, *supra* note 140, § 4.08 ("[M]ost presumptions are created for situations in which the presumed fact is very likely to be true.").

142. *See infra* Part III.C.

143. *See supra* notes 45–47 and accompanying text.

144. *See supra* note 117 and accompanying text.

145. *See supra* notes 50–55 and accompanying text.

146. *See infra* Part III.C.

B. The Constitutionality and Parameters of Permissive Presumptions in Criminal Cases

Several authoritative commentators have thoroughly explored the historical development of the constitutional requirements regarding burdens of proof and presumptions in criminal cases.[147] No useful purpose would be served by retracing those developments in great detail here. The discussion below focuses on the doctrinal points most relevant to the thesis articulated in this Article.

The prosecution, of course, bears the burden of proof in criminal cases. This encompasses two separate burdens that are roughly analogous to their civil case counterparts,[148] although the necessary weight of the evidence varies significantly with the civil burden being a preponderance of the evidence and the criminal burden being beyond a reasonable doubt.[149] Those burdens are: (1) the burden of production (also called the burden of going forward), which is a burden to present sufficient evidence from which the trial judge can conclude that reasonable jurors could find that there is sufficient evidence to find the defendant guilty beyond a reasonable doubt, thereby avoiding a directed verdict of acquittal for the defendant; and (2) the burden of persuasion, which is the prosecution's ultimate burden of convincing the jury that the defendant is guilty of the offense beyond a reasonable doubt.[150]

The proposal herein, calling for a purely permissive presumption, would not affect these burdens of proof. As explained below, purely permissive presumptions in criminal cases, provided that the presumed facts flow rationally from the foundational or basic facts, are constitutional, whereas mandatory presumptions that alter the prosecution's burdens of proof are constitutionally suspect.

---

147. *See, e.g.*, Joshua Dressler, Understanding Criminal Law §§ 7.01–8.04 (6th ed. 2012); Wayne R. LaFave, Criminal Law § 3.4 (5th ed. 2010); 2 McCormick on Evidence, *supra* note 139, §§ 341–49; Evidence Law, *supra* note 140, §§ 4.01–4.13; 21B Charles Alan Wright, Kenneth W. Graham, Victor James Gold & Michael H. Graham, Federal Practice & Procedure: Evidence, Presumptions § 5142 (2d ed. 1980) [hereinafter Fed. Prac. & Proc., Evid., Presumptions].

148. Fed. Prac. & Proc., Evid., Presumptions, *supra* note 147, § 5142.

149. In 1970, the Supreme Court squarely held for the first time that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re* Winship, 397 U.S. 358, 364 (1970) (invalidating a New York criminal statute that allowed juveniles to be convicted based on a preponderance of the evidence). Earlier Supreme Court cases had assumed that "beyond a reasonable doubt" was the necessary burden without expressly holding that it was required by the Due Process Clause. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525–26 (1958) (stating that the margin of erroneous decisionmaking is reduced in criminal cases by placing the burden on the government to show guilt beyond a reasonable doubt).

150. *See generally* Evidence Law, *supra* note 140, § 4.02 (distinguishing and summarizing the burden of production and burden of persuasion).

In *County Court of Ulster County, New York v. Allen*,[151] the leading relevant case, the Supreme Court addressed the constitutionality of a New York statutory presumption that a firearm found in a vehicle is jointly possessed by all of the occupants, subject to certain exceptions enumerated in the statute.[152] Three adult males and a sixteen-year-old girl riding in a vehicle were charged with possessing two handguns found in an open handbag belonging to the girl during a traffic stop.[153] All four occupants were convicted.[154] On appeal, the three males challenged the constitutional validity of the statute, arguing that without the statutory presumption, there was insufficient evidence to convict them.[155] The Court of Appeals for the Second Circuit declared the statute unconstitutional on its face on the basis that the presumption was arbitrary in that it could be applied unfairly, for example, to a hitchhiker in a car found to contain a weapon.[156]

The Supreme Court began its analysis by noting that "[i]nferences and presumptions are a staple of our adversary system of factfinding."[157] The Court wrote that the value and constitutional validity of an inference-drawing or presumption device under the Due Process Clause depends on two considerations: first, the strength of the connection between the "basic" and presumed facts that go to essential elements of the offense;[158] and second, the degree to which the device impinges on the fact finder's freedom to independently assess the evidence.[159] In the end, the ultimate restriction on the use of presumptions is that they not undermine the fact finder's duty to find facts establishing each element of the offense beyond a reasonable doubt.[160]

---

151. 442 U.S. 140 (1979).

152. *Id.* at 142–43.

153. *Id.* at 143.

154. *Id.* at 144.

155. *Id.* at 145.

156. *Id.* at 146, 155, 156 n.15.

157. *Id.* at 156.

158. The value and constitutional validity of inference-drawing or presumption devices "vary from case to case . . . depending on the strength of the connection between the particular basic and elemental facts involved." *Id.* The facts giving rise to a presumption are usually referred to as the "basic" facts and that terminology is used frequently in this Article, along with "foundational facts." The Court in *Allen* referred to presumed facts as "elemental" facts—that is, facts going to the elements of a crime. This Article uses that term occasionally, but for clarity, usually speaks in terms of the "presumed facts."

159. The value and constitutional validity of inference-drawing or presumption devices depend on "the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Id.*

160. *Id.* (citing *In re* Winship, 397 U.S. 358, 364 (1970)). For a discussion of *In re Winship*, see *supra* note 149.

The Court indicated that permissive presumptions,[161] which allow but do not require the fact finder to infer elemental facts and place no burden on the defendant, do not violate due process because such mechanisms do not relieve the prosecution of its duty to prove the elements of the offense beyond a reasonable doubt.[162] The only requirement is that the basic facts bear a rational connection to the presumed facts.[163]

The "rational connection" test originated in *Tot v. United States*,[164] where the Court wrote that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."[165] *Tot* involved a federal statute that made it a crime for a fugitive or person who had been convicted of a violent crime to receive a firearm in interstate commerce. The statute specified that possession of a firearm by any such person was presumptive evidence that the firearm was received in interstate commerce.[166] The Court invalidated the presumption, finding no rational connection between the basic fact (possessing a firearm) and the presumed fact (that it was received through interstate commerce).[167] Crucially, a later case, *Leary v. United States*,[168] indicated the quantum of proof necessary to satisfy the rational connection test and support the existence of a presumed fact in a criminal case is a preponderance or "more likely than not" standard.[169]

While *Allen* endorsed permissive presumptions, it added that mandatory presumptions are "far more troublesome"[170] in terms of their constitutionality because they may excuse the prosecution from bearing its constitutional burden of proving the elemental facts necessary to support a

---

161. The *Allen* Court has been criticized for using the term "permissive presumption." *See* MICHAEL H. GRAHAM, 2 HANDBOOK OF FEDERAL EVIDENCE § 303.4 (7th ed. 2012) (stating the Court created the term "out of whole cloth"). Because the presumption is purely permissive and shifts no burden of either production or persuasion to the defendant, it has been argued that the "permissive presumption" is merely a "permissive inference." *Id.* Graham suggests "instructed factual inference" as a better term. *Id.* While the criticism is well-taken and has been made by others, to avoid confusion, this Article generally uses the term "permissive presumption" in accordance with *Allen*.

162. *Allen*, 442 U.S. at 157.

163. *Id.*

164. 319 U.S. 463 (1943).

165. *Id.* at 467–68.

166. *Id.* at 464, 466.

167. *Id.* at 468. The parties had argued and the government stipulated that the statute applied only to the receipt of a firearm in an interstate transaction and did not apply to firearms that had at some previous time traveled in interstate commerce. *Id.* at 466.

168. 395 U.S. 6 (1969) (holding unconstitutional a presumption that possession of marijuana establishes knowledge of its illegal importation).

169. A statutory presumption in a criminal case will be regarded as "'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36.

170. Cnty. Court of Ulster Cnty., N.Y. v. Allen, 442 U.S. 140, 157 (1979).

conviction beyond a reasonable doubt.[171] The Court explained that mandatory presumptions include both presumptions that shift the burden of production and those that shift the ultimate burden of persuasion.[172] The Court did not expressly state that mandatory presumptions in criminal cases are unconstitutional, but later cases have indicated that they are if they shift the burden of persuasion.

In *Francis v. Franklin*,[173] the Court found error in a murder case jury instruction stating that persons of sound mind are presumed to intend the natural and probable consequences of their acts because the jury could have understood the instruction as creating a mandatory presumption that shifted the burden of persuasion to the defendant to prove lack of intent.[174] In rejecting the presumption, the Court used language suggesting that any mandatory presumption shifting the burden of persuasion violates due process.[175]

On the other hand, presumptions shifting only the burden of production, even if mandatory, may be constitutional depending on their application to the facts of a particular case, particularly the strength of the connection between the basic facts and the presumed facts. The *Allen* Court did not rule on this issue, but suggested that a mandatory presumption that imposes "an extremely low burden of production" that can be satisfied by the defendant producing "'any' evidence" may have no greater impact than a permissive presumption "and it may be proper to analyze it as such."[176]

In *Sandstrom v. Montana*,[177] the Court declined to the address the issue in a case where the defendant was convicted of deliberate homicide at a trial in which the jury was instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[178] The defendant challenged the instruction, arguing that it unconstitutionally shifted the burden of proof on the issue of purpose or knowledge to the defendant.[179] The state asserted that even if the presumption was viewed as mandatory (which the state disputed), it did not conclusively establish

171. *Id.* at 157–59.

172. *Id.* at 157 n.16.

173. 471 U.S. 307 (1985).

174. *Id.* at 325.

175. *Id.* at 317 ("Our cases make clear that '[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.'") (quoting Patterson v. N.Y., 432 U.S. 197, 215 (1977)). *But see* 2 McCormick on Evidence, *supra* note 139, § 347 (suggesting that a mandatory presumption shifting the burden of persuasion might pass constitutional muster if rational jurors could find the presumed facts established beyond a reasonable doubt from the basic facts).

176. *Allen*, 442 U.S. at 157 n.16.

177. 442 U.S. 510 (1979).

178. *Id.* at 512.

179. *Id.* at 513.

intent; rather, the presumption could be rebutted on a showing of "some" contrary evidence.[180]

In other words, the state asserted that the presumption shifted only the burden of production and not the burden of persuasion. The Court declined to review the argument on the basis that the jury instruction created a risk that jurors could construe the presumption as conclusively establishing intent.[181] Some lower federal courts have permitted presumptions in criminal cases that shift only the burden of production.[182] In general, commentators agree that the extent to which any type of statutory mandatory presumptions in criminal cases are constitutional remains unsettled.[183]

To minimize constitutional concerns, the presumption called for in this Article would be purely permissive, shifting neither the burden of production nor the burden of persuasion to the defendant. Rather, the jury would be told only that it *may* presume the fact of elder financial exploitation from the basic facts enumerated in the statutory proposal.[184]

Allen indicated that in criminal cases involving presumptions, the jury instructions will be pivotal in determining what type of inference or presumption is applicable.[185] It was the trial judge's jury instruction in *Allen* that saved the convictions. The Court explained that those instructions made

> it clear that the presumption was merely a part of the prosecution's case, that it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal.[186]

The trial judge also elaborated on the essential requirement that, when all is said and done, the jury must be convinced of the defendant's guilt beyond a reasonable doubt.[187] Finding the connection between the statutory presumption of joint possession of the firearms and the facts of

---

180. *Id.* at 515.

181. *Id.* at 515–16.

182. Post-*Allen*, lower federal court cases "seem to make it clear that a presumption that clearly shifts nothing other than the burden of production will be scrutinized in the same way as a permissive presumption and pass constitutional muster if it meets a rational connection test." 2 MCCORMICK ON EVIDENCE, *supra* note 139, § 347; *see* Francis v. Franklin, 471 U.S. 307, 314 n.3 (explicitly refraining from deciding whether a mandatory presumption that shifts only the burden of production comports with due process).

183. *See, e.g.*, LAFAVE, *supra* note 147, § 3.4(c) (concluding that the constitutionality of statutory mandatory rebuttable presumptions is not clear after an analysis of relevant case law).

184. *See infra* notes 250–251 and accompanying text.

185. *See* Cnty. Court of Ulster Cnty., N.Y. v. Allen, 442 U.S. 140, 157 n.16 (1979); s*ee also* Sandstrom v. Montana, 442 U.S. 510, 514 (1979) (stating in a post-*Allen* presumption case that determining the nature of a presumption at issue "requires careful attention to the words actually spoken to the jury").

186. *Allen*, 442 U.S. at 160–61.

187. *Id.* at 162.

the case to be "entirely rational,"[188] the Court rejected the respondents' arguments and upheld the convictions.

Important to the proposal in this Article, the Court made it clear that presumptions are to be evaluated not in isolation, but in relation to *all* of the evidence in the case.[189] In other words, the required rational connection between the basic fact (in *Allen*, a gun found in a vehicle) and the presumed fact (joint possession by all occupants) can be established and strengthened by considering all of the relevant facts and logical inferences to be drawn from them. Also important, the Court reaffirmed the *Leary* position that for permissive presumptions, it is only necessary that the basic facts support the presumed fact by a more likely than not standard.[190] Because the jury is free to reject the inference, it is not necessary that the basic facts prove the presumed fact beyond a reasonable doubt.[191] In *Allen*, the majority concluded that the totality of the facts proved by the prosecution showed "more likely than not" the existence of the presumed fact of joint possession of the firearms by all occupants of the vehicle.[192]

One point that has not been definitively resolved is the quantum of proof required for the basic facts supporting the presumption. It has been suggested that a more probable than not standard should apply in theory, but that since in the majority of criminal cases the basic facts will themselves be "elemental facts"—facts necessary to support an element of the crime—such facts would independently be subject to the requirement that they be proven beyond a reasonable doubt.[193] Where the basic facts are not elemental, it would be proper to instruct the jury in terms of a preponderance of the evidence standard.[194] Although state definitions of elder exploitation vary, it is inevitable that at least some of the basic facts in the statutory proposal below would be elemental. To minimize constitutional concerns and ensure clarity, the prosecution should be held to a beyond a reasonable doubt standard of proof with regard to the basic facts.

---

188. *Id.* at 163.

189. The Court placed weight on several facts that made it unlikely the sixteen-year-old girl in whose purse the two handguns were found was the sole possessor of the guns. *Id.* at 163–64. For example, the Court noted that the "two guns were too large to be concealed in her handbag," her handbag was open and part of one of the guns was in plain view, and as "a 16-year-old girl in the company of three adult men she was the least likely of the four to be carrying one, let alone two, heavy handguns." *Id; see* LAFAVE, *supra* note 147, § 3.4(b) (construing *Allen* to mean that, to test a permissive inference, the only necessary consideration is that there is a rational basis for a jury to infer one fact from another after considering "*all* the evidence in the *particular* case").

190. *Allen*, 442 U.S. at 166, 116 n.28.

191. *Id.* at 166–67.

192. *Id.* at 164–65.

193. GRAHAM, *supra* note 161, § 303:4 n.22.

194. *Id.*

The procedural advantages of my presumption proposal for prosecuting elder financial exploitation would be twofold. In cases in which the state lacks specific proof of exploitation, whether due to the incapacity, death, or lack of cooperation of the elder victim, the presumption would allow the state to get past a motion of a directed verdict of acquittal at the close of the state's case. Assuming the trial judge determined that the evidence—including the presumption of exploitation—was sufficient to allow reasonable jurors to conclude guilt beyond a reasonable doubt, the motion for directed verdict should be denied. To benefit from this bolstering effect of the presumption, the state would have to present evidence establishing the statutory basic facts in its case-in-chief. At the close of the evidence, the prosecution would then benefit from a jury instruction telling the jurors that, assuming they find the basic statutory facts to have been established, they could presume exploitation and consider the presumption in addition to all of the other evidence in deciding whether the defendant was guilty beyond a reasonable doubt.

C. The Proposal

With the above groundwork, this Article proposes state criminal statutes that create a permissive presumption of exploitation with respect to certain financial conveyances from elders. State laws for prosecuting elder financial exploitation vary widely.[195] The goal of this Article is not to craft a one-size-fits-all piece of uniform legislation, but rather to set forth a conceptual legislative framework, using a detailed proposed permissive presumption statute as a tool, that could be fashioned by legislators in different states to fit within their existing legislative schemes.

A state adopting this conceptual approach may want or need to alter some of the specifics of the proposed statute. Indeed, the nature of the presumption itself will vary depending on the individual state. My proposal would create a presumption of "exploitation" once the basic facts outlined in the statute have been established. Depending on the state's legislative scheme for prosecuting elder financial exploitation, the presumption might be characterized instead as a presumption of undue influence, misrepresentation, fraud, theft, or lack of consent. Similarly, for reasons discussed in the analysis of the statutory component parts,[196] states may wish to amend some of the basic facts giving rise to the presumption. For the purposes of this Article, I included all the major provisions in a single statute, but separate definitional statutes defining key terms might be preferable for purposes of organizational clarity.

---

195. *See generally* Dessin, *Is the Solution a Problem?*, *supra* note 21 (analyzing the variety of state statutes used to address elder financial exploitation).

196. *See infra* notes 211–256 and accompanying text.

1. Introduction to the Proposed Statute

The statute proposed here contains several basic or foundational facts that would have to be proved to give rise to the presumption of exploitation. Most statutory presumptions arise on proof of a single basic fact.[197] The use of multiple basic facts is designed to increase the strength of the constitutionally required rational connection[198] between the basic facts and the presumed fact of exploitation.

Probabilistically, facts *A* + *B* + *C* + *D* + *E* are more likely to support *X* than simply *A*, *then X*. For example, the presumption in *Allen*, while upheld as constitutional, could be made more probabilistically reliable if the statute specified that a presumption of joint possession of a firearm in a vehicle arises from the fact of occupancy in the vehicle *and* being within the area of immediate dominion and control of the firearm: *A* (occupancy) + *B* (being within the area of control) warrant a stronger inference of *X* (joint possession) than would only *A*, *then X*. If we added *C* (the firearm was visible to the person), the presumption would be strengthened further. It would be difficult to construct a *single basic fact, then exploitation* presumption for elder financial exploitation crimes, in part due to the complexity of the crimes.

Not all criminal presumptions are limited to proof of a single basic fact. For example, both federal[199] and state[200] extortionate credit statutes create a presumption of extortion in the event that the prosecution proves a combination of several basic facts. It is asserted that presumptions based on multiple basic facts should be less constitutionally suspect than those dependent on a single fact because the combination of facts is likely to increase the probability that the inferred fact is true.[201]

---

197. *See generally* JACK B. WEINSTEIN & MARGARET A BERGER, 5 WEINSTEIN'S FEDERAL EVIDENCE § 303 app. 100(2) (Joseph M. McLaughlin ed., 2d ed. 2013) (listing federal criminal statutes that create presumptions or inferences based on the proof of specified basic facts, most of which depend on proof of a single basic fact).

198. *See supra* notes 164–169 and accompanying text (discussing the Supreme Court's rational connection test for presumptions in criminal cases as originated in *Tot v. United States*).

199. 18 U.S.C. § 892(b) (2013) (creating an inference of extortionate credit provided the following basic facts are established: (a) that the extension of credit was unenforceable by civil process; (b) that the extension of credit was made at a rate in excess of forty-five percent a year; (c) that the debtor reasonably believed that the creditor previously had collected extensions of credit by extortionate means or had the reputation of using extortionate means to collect; and (d) that the total of the extensions of credit by the creditor to the debtor exceeded one hundred dollars).

200. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2302(B) (2013) (creating an inference of extortionate credit provided the following basic facts are established: (a) that the repayment of the extension of credit would be unenforceable through civil judicial processes; (b) that the extension of credit was made at a rate of interest in excess of an annual rate of forty-five percent; (c) that the debtor reasonably believed that one or more extensions of credit by the creditor had been collected by extortionate means or that the creditor had a reputation of using extortionate means to collect extensions of credit; and (d) that the total of the extensions of credit outstanding exceeded one hundred dollars).

201. Some well-established civil law presumptions depend on the proof of multiple facts, such as the presumption that a letter properly addressed, stamped, and deposited in a mail receptacle was

Summarized, my statutory proposal is that exploitation may be presumed if the following facts are proved: (a) an inter vivos transfer of money or property valued in excess of $1000; (b) by a person age sixty-five or older; (c) to a non-relative; (d) whom the transferee has known fewer than two years before the first transfer; (e) for which the transferee did not receive reciprocal value in goods or services. Defenses would include valid charitable gifts and valid loans evidenced in writing with definite repayment dates and that are not in default.

A presumption of exploitation in light of these facts would meet or exceed the "more likely than not" standard of proof established in *Leary* and reaffirmed in *Allen* with regard to the strength of the connection between the basic and presumed facts. This is particularly true in light of the *Allen* Court's holding that permissive presumptions are to be analyzed *as applied*, not solely on their face, and will pass muster if all of the facts in evidence support the presumed fact by a preponderance of the evidence.[202]

Additional facts that are markers for exploitation, beyond the statutory basic facts in my proposal, are likely to be present in all elder financial exploitation cases and could be considered in determining the rational connection between the basic and presumed facts. For example, this Article has discussed how cognitive and physical impairments are often associated with elder fraud exploitation,[203] as is living alone,[204] depression,[205] and recent loss of a loved one.[206] Proof of such facts could be considered by the fact finder in deciding whether to draw the presumption.

The required rational connection between basic and presumed facts need be grounded only in common sense and experience.[207] Presumptions are not required to be supported by empirical evidence or expert opinion. However, to the extent the inference is supported by valid scientific or empirical research, as several of the vulnerability and exploitation indicator factors discussed in Part I appear to be, expert testimony should be admissible to strengthen the presumption.

---

delivered. *See* EVIDENCE LAW, *supra* note 140, § 4.08 (discussing this long-accepted common law presumption). This presumption depends on proof that: (1) the letter was in fact properly addressed; (2) that proper postage was affixed to it; and (3) that it was indeed deposited into a mail receptacle.

202. *See supra* note 190 and accompanying text.

203. *See supra* notes 56–99 and accompanying text.

204. *See supra* notes 45–46 and accompanying text.

205. *See supra* notes 100–106 and accompanying text.

206. *See supra* note 48 and accompanying text.

207. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 314–15 (1985) ("A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury."); Barnes v. United States, 412 U.S. 837, 845 (1973) (upholding a jury instruction informing jurors that unexplained possession of recently stolen property supports a presumption that the defendant knew that the property was stolen because the presumption was grounded in "common sense and experience"); Tot v. United States, 319 U.S. 463, 467–68, 470–72 (1943) (stating that a statutory presumption will be considered arbitrary and invalid unless the rational connection between the basic fact and the presumed fact is based in "common experience").

2. *The Proposed Statute*

Here is the proposed statute:

> (1) Any inter vivos transfer of money or property valued in excess of $1,000 (one thousand dollars), whether in a single transaction or multiple transactions, by a person age 65 (sixty-five) or older to a non-relative whom the transferor knew for fewer than two years before the first transfer and for which the transferor did not receive reciprocal value in goods or services shall create a permissive presumption that the transfer was the result of exploitation.
>
> (2) Subsection(1) shall apply regardless of whether the transfer or transfers are denoted by the parties as a gift or loan except that it shall not apply to a valid loan evidenced in a writing and which includes definite repayment dates; provided: in the event repayment of any such loan is in default, in whole or in part, for more than 60 (sixty) days, the presumption of subsection (1) shall apply. Subsection (1) does not apply to persons or entities that operate legitimate lending institutions.
>
> (3) This section does not apply to valid charitable donations to non-profit organizations qualifying for tax exempt status under the Internal Revenue Code.
>
> (4) In a criminal case in which subsection (1) applies, jurors shall be instructed that they may, but are not required to, presume [or "infer"[208]] exploitation upon proof beyond a reasonable doubt of the facts listed in subsection (1).[209] Jurors shall also be told that they may find a defendant guilty only if persuaded that each element of the offense has been proved beyond a reasonable doubt.[210]

3. *Analysis of the Statutory Component Parts*

a. *Any Inter Vivos Transfer of $1000*

The statute is intended to address all types of asset transfers with one exception: it is limited to inter vivos transfers and not intended to cover bequests by wills or trusts for which a large separate body of probate law exists addressing issues of undue influence.[211] Inter vivos gifts or loans are present transfers involving active elder abuse, not events that need to be

---

208. Depending on state law, legislatures would have to consider whether to use the stronger word "presume" or the weaker word "infer" in the jury instruction. *See, e.g.*, People v. Colantuono, 865 P. 2d 704, 714 (Cal. 1994) (stating any reference to the word "presume" in jury instructions can be problematic).

209. While the issue is not free from doubt, the safest course would be to require that all basic facts be proved beyond a reasonable doubt rather than by a more likely than not standard because at least some of the basic facts are likely to be elemental facts (i.e., necessary to prove an element of the offense) under the state's definition of the crime charged. *See supra* notes 193–194 and accompanying text. This higher standard of proof should not be a substantial obstacle given that in most cases the basic facts outlined in the statute will be susceptible to objective proof beyond a reasonable doubt.

210. To the extent that this provision could be construed as an unwarranted intrusion by the legislature upon the judiciary, it might be preferable to leave this portion of the statute to the state body charged with crafting model jury instructions.

211. *See, e.g.*, FLA. STAT. § 732.5165 (2013) (invalidating a will or gift procured by undue influence); CAL. PROB. CODE § 6104 (West 2013) (same).

unraveled by the probate system, often years later, when the victim is deceased. Additionally, a layer of protection already exists with respect to wills and trusts because an attorney is usually involved in the drafting. Outright transfers, on the other hand, often occur without scrutiny.[212]

Setting the threshold at $1000 is an admittedly arbitrary choice. The goal is to set a threshold sufficiently high so as to not include, even if only hypothetically, every financial gift from an elder, but low enough to capture perpetrators who perform "hit and run"-type cons on elders rather than long-term, continuing scams. I argue below that the error rate in applying the proposed presumption is likely to be extremely low.

Nevertheless, if legislative drafters were concerned about unwarranted application of the presumption, the number could be raised. The higher the statutory monetary threshold, the stronger the inference that the victim would not, in the absence of exploitation, have transferred the assets without fair consideration. In 2014, the presumption proposed in this Article was introduced as a bill in the Florida Legislature as part of a broad package of elder protection laws.[213] The bill made one substantive change in the proposal, which was to increase the triggering asset amount from $1000 to $10,000.[214]

b. By a Person Age 65 or Older

Deciding exactly who should be protected by the presumption statute is tricky, both as a matter of probability of victimization and due to concerns about stereotyping or "ageism." One commentator has

---

212. Another omission is fraudulent transfers of powers of attorney, which can be a significant source of elder abuse. *See, e.g.*, Dana Shilling, *License to Steal? The Uniform Power of Attorney Act and Other Tools to Fight Power of Attorney Abuse*, 218 ELDER L. ADVISORY, Apr. 2009, at 1–6 (explaining the potential for elder exploitation in connection with powers of attorney and discussing the Uniform Power of Attorney Act); Irene D. Johnson, *Preventing Identity Theft and Other Financial Abuses Perpetrated Against Vulnerable Members of Society: Keeping the Horse in the Barn Rather than Litigating Over the Cause and/or Consequences of His Leaving*, 79 UMKC L. REV. 99, 106–10 (2010) (discussing potential fraud against elders in connection with executing powers of attorney). Most powers of attorney granted by elders are to relatives and would be excluded from my proposal by its limitation to non-relatives. Interview with Lynda Wray Black, law professor and estate planning practitioner with more than twenty years of experience, in Memphis, Tenn. (Mar. 24, 2014). Although not addressed here, it should be feasible to include transfers of powers of attorney to non-relatives in an exploitation presumption statute under basic facts similar to those proposed herein.

213. H.B. 409, 2012 Leg. Reg. Sess. (Fla. 2014). As of March 24, 2014, the bill had passed unanimously through the House Criminal Justice Subcommittee, House Justice Appropriations Committee, and House Judiciary Committee. *See* Bill tracking for CS/CS/HB 409—*Offenses Against Vulnerable Persons*, Florida House of Representatives, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51542 (last visited Apr. 24, 2014) (follow the respective "See Votes" hyperlinks for voting outcome in each committee). An identical companion bill has been introduced in the Florida Senate. S.B. 588, 2012 Leg., Reg. Sess. (Fla. 2014).

214. Fla. H.B. 409 § 4(2) (amending section 825.103 of Florida Statutes by setting forth the presumption of exploitation proposed in this Article, but raising the triggering asset amount from $1000 to $10,000).

criticized elder financial exploitation statutes that apply to persons based on their age as "ageist stereotyping" and asserted that elders need no special protection as a group,[215] a dubious proposition in light of the occurrence rates for elder exploitation and the heightened risk for exploitation associated with aging.

This Article opts for an age-based approach and the age of sixty-five as a triggering fact. Sixty and sixty-five are the most common statutorily specified ages in statutes protecting against elder exploitation.[216] An argument for a higher age limit may exist in light of the studies cited in Part I showing that the "oldest old" are the most frequent targets of elder financial exploitation.[217] It is difficult to get an accurate fix on the issue because of the underreporting problem.[218]

Using a fixed age as a proxy for vulnerability to financial exploitation is imperfect, just as using fixed ages for laws that protect children, such as statutory rape laws or laws imposing a minimum age of consent for medical treatment,[219] is imperfect. While not all elders suffer from cognitive impairment, substantial evidence discussed in Part I shows that older adults are frequently targeted for exploitation based on vulnerability factors associated with aging, including cognitive impairments.[220] Part I discusses emerging research showing that brain changes in older adults may make them vulnerable to exploitation even when they appear to be of normal capacity.[221]

Weakening any ageist criticism of an age-based proposal, whatever the age selected, is that the statute does not deprive elders of any rights or autonomy based on their age. The proposal would not, for example, invalidate qualifying financial transfers from an elder or impose guardianships or conservatorships on elders who give away their money.[222]

---

215. Dessin, *Is the Solution a Problem?*, *supra* note 21, at 292–303 (criticizing age-based elder protective legislation as insidious "ageist stereotyping" and asserting that "there seems no justifiable reason for protecting the older citizen simply because he is old").

216. *See id.* at 300.

217. *See supra* notes 34–36 and accompanying text.

218. *See supra* Part II (discussing the under-reporting of elder financial exploitation).

219. *See, e.g.*, Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1225–30 (1998) (critiquing the determination of consent in statutory rape cases based on fixed ages and discussing studies showing that many minors are capable of making competent decisions in several areas, including sexual contact and medical treatment).

220. *See supra* Part I.

221. *See supra* notes 72–106 and accompanying text.

222. Although not consequences of the proposal in this Article, both of these approaches are in use and warrant consideration as ways to bolster the protection of elders from financial predators. Maine has a statute that creates a rebuttable presumption of undue influence for any transfer by an elder of real estate or a major transfer of money or personal property for less than full consideration to a person with whom the elder has a confidential or fiduciary relationship. ME. REV. STAT. tit. 33, § 1022(1) (West 2013). If the transferee fails to rebut the presumption, the elder is entitled to the transfer. *Id.* Some states also have provisions for emergency guardianships or court orders freezing

Rather, the presumption would come into play only in a criminal prosecution in which prosecutors and a reviewing judge have already made a determination that probable cause exists to believe that the defendant has financially exploited the elder victim.

An alternative approach to relying on a fixed age as one of the basic facts would be to replace the language "by a person [of a specified age]" with a generic term such as "vulnerable adult." Some states now use that term in place of or in addition to age-based provisions in their adult protection legislation. The definitions of vulnerable adult vary by state,[223] but generally speaking, apply to any person over the age of eighteen who suffers from an impairment that makes the person unable to provide for his or her own care.[224]

While substituting a "vulnerable adult" test for an age-based provision might be a good policy choice in many contexts involving adult protective services, using the term in an exploitation presumption statute would weaken the effectiveness of the statute. On the surface, it would present an advantage in that proof that the victim was "vulnerable" within the statutory definition would strengthen the inferential connection between that basic fact and the presumed fact of exploitation. Certainly, standing alone, proving the victim was incapable of handling her own affairs would create a stronger inference of exploitation than simply proving that she was above a certain age.[225]

But one of the primary purposes of presumptions is to make it easier to prove events that, although probable, remain difficult or impossible to prove without the presumption.[226] Most familiar presumptions in the law

---

assets in elder exploitation cases. *See, e.g.*, CAL. PROB. CODE § 2901 (West 2013) (providing for issuance by public guardians of certificates to financial institutions giving the public guardian immediate control over a suspected victim's assets); *see also* Betty Malks et al., *Combating Elder Financial Abuse—A Multi-Disciplinary Approach to a Growing Problem*, J. ELDER ABUSE & NEGLECT, July 2003, at 55, 61–64 (describing effectiveness of quick-action multi-agency California elder financial protection task forces that use California Probate Code § 2901 to obtain immediate control over a suspected victim's assets).

223. *See, e.g.*, ALASKA STAT. ANN. § 47.24.900(21) (West 2013) (defining "vulnerable adult" as "a person 18 years of age or older who, because of incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance, is unable to meet the person's own needs or to seek help without assistance"); IDAHO CODE ANN. § 39-5302(10) (West 2013) (defining "vulnerable adult" as "a person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person"); MD. CODE ANN., FAM. LAW § 14-101(q) (West 2013) (defining "vulnerable adult" as "an adult who lacks the physical or mental capacity to provide for the adult's daily needs").

224. *See id.*

225. Of course, it is not argued that the basic fact of being age sixty-five or older is by itself sufficient to create a rational inference of exploitation, but only in combination with the other basic facts contained in the statute.

226. 2 MCCORMICK ON EVIDENCE, *supra* note 139, § 343 (stating that presumptions are usually created based not only on a judicial estimate of probabilities, but "upon the difficulties inherent in proving that the more probable event in fact occurred").

incorporate (more or less) bright-line basic facts as the predicate for the presumption, such as the presumption that a person missing for seven years is deceased and that a dated writing bears the accurate date. Making the exploitation presumption depend on proof of a mushy, potentially difficult-to-prove predicate fact of vulnerability, or some other lack of capacity, would reduce the usefulness of the presumption. "[O]ver age 65" (or whatever age a legislature decided to use) is a concrete, objectively provable fact. Of course, even under a fixed-age statute, proof of incapacity would be relevant and admissible and, under *Allen*, could be considered in assessing the strength of the rational connection between the basic facts and the presumed fact of exploitation.

Also problematic with a generic "vulnerable adult" definition is that it may, depending on the wording, be insufficient to cover many elder victims who need protection. In general, states shifting to a "vulnerable adult" standard in statutes designed to protect elders should exercise care in crafting a definition that is not overly restrictive, unintentionally making it even more difficult to combat elder abuse and exploitation.

As one example, Alaska defines vulnerable adult as "a person 18 years of age or older who, because of incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance, is unable to meet the person's own needs or to seek help without assistance."[227] Such a definition is under-inclusive with respect to elder financial exploitation in that it would not apply to many elders who are able to meet their own needs and seek help without assistance but who are nevertheless susceptible to exploitation.[228] The definition fails to recognize the sliding scale of incapacity with respect to cognitive impairments in elders[229] and the research showing that elders who appear to have normal mental capacity can still be vulnerable to exploitation.[230] Of course, nothing would prevent a state from using a "vulnerable adult" approach in the context of adult protective services generally while augmenting it with age-based statutes specifically directed at elder exploitation.

c. To a Non-Relative

The restriction to non-relative exploiters is an unfortunate but necessary limitation to the legitimacy of the proposal. Sadly, a substantial percentage of elder financial fraud is committed by relatives.[231] When that

227. ALASKA STAT. ANN. § 47.24.900(21).

228. The definition would not, for example, have included our father, who up until the day he died completely and insistently managed his life, including (unwisely and against advice) driving and running his own errands.

229. *See supra* note 62 and accompanying text.

230. *See supra* notes 67–69, 72–99 and accompanying text.

231. *See supra* note 33 and accompanying text.

happens, law enforcement should pursue and prosecute the perpetrators. However, given the unique, varied statuses and relationships of relatives, it would probably be impossible to craft a presumption statute that included them. Older relatives frequently make valid gifts or loans to relatives for no consideration. Thus, presuming that a financial transfer from an elder to a relative was the result of exploitation would not accord with common experience or probabilities. As a consequence, it most likely would be considered arbitrary and violate due process under the *Tot-Leary-Allen* line of cases.

d. Whom the Transferor Knew for Fewer than Two Years Before the First Transfer

Whereas elders frequently make financial gifts to relatives, they do not usually give money away to relative strangers. The shorter period of time that an elder has known the transferee, the stronger the inference that the transfer was the result of exploitation.

Selecting a perfect "knowing" period is impossible given the vicissitudes of human interaction. On one end of the continuum, it is not uncommon for people to make gifts or valid loans, even large ones, to lifelong friends to whom they are not related. On the other end, common experience shows that people do not usually transfer large amounts of money or property for inadequate consideration to people that they have known for only a short time. While no empirical evidence exists, anecdotally, the cases and commentary encountered in researching this Article show that elder financial exploitation involving non-family members usually occurs, or begins, in situations where the elder knew the accused for only a short period.[232] The shorter the statutory knowing-period selected, the stronger the inference that exploitation occurred.

Because elder financial exploitation schemes can continue for years, it is important that the statutory "knowing" period be triggered by the first transfer of money or property. In other words, the exploitation presumption would arise unless the accused knew the elder for a period of

---

232. Our father apparently knew the Defendant for less than a month before he began giving her thousands of dollars for her claimed medical treatment. The following colloquy occurred in his interview with the investigating detective:

Q. Okay so you met her in March and shortly thereafter you gave her the money.

A. Maybe I met her in February—it could be but . . . .

Q. Okay.

A. . . . the—the—the money started in . . . .

Q. In March.

A. . . . in—in—in March the first couple of weeks of March.

Interview by Detective Edward Goldbach with Donald McClurg, *supra* note 46, at 10.

at least two years—or whatever period a legislature adopted—prior to any transfer of assets.

e. For Which the Transferee Does Not Receive Reciprocal Financial Value in Goods or Services

One of the clearest markers of elder financial exploitation, or fraud of any type, is when a person gets little or nothing in return for his or her asset transfers.[233] Except with respect to valid charitable donations (covered below) and gifts to family, common experience informs us that people do not usually give away large sums of money or other assets without receiving goods or services of relatively equal value in return.

f. Not Applicable to Valid Loans

As discussed throughout this Article, a primary obstacle to prosecuting elder financial exploitation and a primary reason for my proposal is the difficulty in proving that asset transfers superficially appearing to be gifts or loans were in fact the result of exploitation, undue influence, and/or psychological manipulation. Elder predators frequently seek to disguise exploitative transactions as legitimate ones. Thus, the presumption must apply regardless of how the parties characterize the transactions.

An exception, however, is needed for valid loans.[234] To be considered valid, the statute requires that the loan be evidenced in writing with definite repayment dates.[235] In the event the loan goes into default for more than sixty days, the presumption would arise and apply. This is needed to prevent the perpetrator from simply disguising the transactions as loans while never intending to repay them.

A potential question arises as to who would bear the burden of proof on the issue. Would the state have the burden of proving the conveyances were not valid loans or would it be proper to place the burden on the defendant to show they were valid loans?

The "valid loan" exception would be in the nature of an affirmative defense that although courts and commentators have sometimes struggled to distinguish the two,[236] differs from a burden-shifting presumption in

233. *See, e.g.*, LORI A. STIEGEL, NAT'L ACAD. OF ELDER LAW ATT'YS, INC., FINANCIAL ABUSE: HOW IT MAY IMPACT YOUR CLIENTS AND YOUR PRACTICE 4 (2001) (asserting that not receiving services for which payment has been made is an indicator of financial exploitation).

234. An exemption for legitimate lending institutions is also included to reduce any concern that the presumption could be applied to such an entity.

235. *Cf.* Hafemeister, *supra* note 6, at 396 (noting that financial exploitation may be indicated by the lack of proper documentation for financial transactions and arrangements).

236. 2 MCCORMICK ON EVIDENCE, *supra* note 139, § 346 (stating that "the courts and writers have struggled to define and distinguish presumptions and affirmative defenses").

that the burden placed on the defendant by an affirmative defense is established at the outset based on existing statutory or case law.[237]

In a line of cases culminating with *Patterson v. New York*,[238] the Supreme Court established the constitutional doctrine regarding burdens of proof and affirmative defenses in criminal cases. Early on, in *Leland v. Oregon*,[239] the Court held that a defendant raising a defense of insanity could properly be required to prove insanity at the time of the offense beyond a reasonable doubt.[240] Three decades later, in *Mullaney v. Wilbur*,[241] the Court suggested that the prosecution may have the burden of persuasion as a matter of due process with regard to affirmative defenses,[242] calling the continued viability of *Leland* into question.

In *Patterson*, the defendant was charged with second-degree murder after shooting a man in the company of his estranged wife.[243] A New York statute furnished an affirmative defense if the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[244] In accordance with New York law, the trial court instructed the jury that the defendant bore the burden of proving this defense by a preponderance of the evidence.[245] In response to a challenge that placing such a burden on the defendant violated due process, the Court held that once the state proved beyond a reasonable doubt the facts constituting the elements of the crime, it could refuse to sustain an affirmative defense unless supported by a preponderance of the evidence.[246]

Thus, it appears the state could properly require a defendant who raises a "valid loan" defense to bear even the *burden of persuasion* on that issue by a preponderance of the evidence. In any event, there would be no problem requiring the defendant to bear the *burden of production* on the issue. McCormick observes and cites support for the proposition that courts "have had no trouble" with affirmative defenses that require

237. *Id.*

238. 432 U.S. 197 (1977).

239. 343 U.S. 790 (1952).

240. *Id.* at 798–800.

241. 421 U.S. 684 (1975).

242. *Id.* at 704. In *Mullaney*, the jury was instructed that if the prosecution proved an intentional, unlawful homicide, malice aforethought was presumed unless the defendant proved by a preponderance of the evidence that he was acting in the heat of passion. *Id.* at 686. On certiorari, the Court held that placing the burden on the defendant ran contrary to *In re Winship* and violated due process, thereby creating grounds for reversal of the conviction. *Id.* at 703–04.

243. 432 U.S. at 198.

244. *Id.*

245. *Id.* at 200.

246. *Id.* at 206. The Court stated: "We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.* at 210.

defendants to bear only a burden of production.[247] LaFave makes a similar observation.[248] To reduce any potential for confusion on the issue, it might be desirable to add a clear statement in the statute that the valid loan exception is an "affirmative defense."[249]

g. Not Applicable to Valid Charitable Donations

Similar to the exemption for valid loans, an exception is required for valid charitable contributions. The analysis of this exception in terms of the burden of proof would track that for valid loans above; that is, a defendant claiming that assets transferred from the victim constituted a valid charitable donation could properly be made to bear the burden of proof on that issue.

h. Jury Instructions

This final provision makes it clear that the presumption created by the statute is a permissive one that does not shift the burden of proof, either the burden of production or persuasion to the defendant, assuring that the presumption would pass constitutional scrutiny.

States should create a model jury instruction to accompany the statute. An instruction capturing the gist of what should be conveyed to the jury could read similarly to this:[250]

> There is in effect in the state of *X* a statute that allows a presumption of financial exploitation to be drawn if you find the prosecution has proved the following facts beyond a reasonable doubt: (1) that the defendant received money or property from [name of victim] valued in excess of $1000; (2) that [name of victim] is a person age sixty-five or older; (3) that the defendant is not a relative of [name of victim]; (4) that [name of victim] knew the defendant for fewer than two years prior to the first transfer of money or property; and (5) that [name of victim] did not receive reciprocal value in goods or services for the transfer of money or property.
>
> If you find the prosecution has proved these facts beyond a reasonable doubt, you may but are not required to presume that the transfer or transfers were the result of exploitation.
>
> Even if you make this presumption, however, you may find the defendant guilty only if you are convinced that the state has proved the

247. 2 MCCORMICK ON EVIDENCE, *supra* note 139, § 347.

248. LAFAVE, *supra* note 147, § 3.4(f) ("Sometimes claims of exemption from a statutory prohibition are based upon some proviso or exception appearing in the statute, in which case courts frequently hold that the burden of coming forward with proof of the exculpatory fact is on the defendant.").

249. This approach might also be desirable with respect to the charitable gift exception.

250. As with the proposed statute itself, the wording of the instruction would vary depending on the nature and wording of the state's elder financial exploitation statutes.

> guilt of the defendant beyond a reasonable doubt as that term is defined in these instructions.[251]

In cases where the defendant asserts the transfers were valid loans or charitable gifts, a separate instruction would be required on those points.

An error rate, of course, is present in all presumptions. Not every person missing for seven years is deceased, not every dated document bears the correct date, and not everyone in every vehicle containing a firearm jointly possesses the firearm.[252] Can one hypothesize financial transfers that would meet the basic facts of the proposed statute but which would be legitimate gifts or loans not the result of exploitation? Of course, just as the Court of Appeals in *Allen* was able to hypothesize situations where it would be arbitrary to presume that a firearm found in a motor vehicle was jointly possessed by all of the occupants, such as where a hitchhiker is riding in a car with a small handgun hidden under the seat or in the glove compartment.[253] The *Allen* majority rejected the appellate court's hypotheticals as "implausible,"[254] but more importantly, the Court indicated that imagining improbable situations to which a presumption would be wrongly applied is not the proper mode of analysis.[255]

With respect to the proposal herein, two important error-avoidance mechanisms would work to minimize, if not eliminate, unwarranted applications of the presumption as a practical matter. First, just as the Supreme Court responded to the Court of Appeals' hitchhiker example in *Allen* by observing the unlikelihood that such a prosecution ever would be pursued, legitimate financial transfers from elders will be unlikely to result in criminal prosecutions. Indeed, as explained in

---

251. Such an instruction would roughly track subsection (c) of rejected Federal Rule of Evidence 303, which reads:

> (c) Instructing the Jury. Whenever the existence of presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond reasonable doubt.

Proposed Rule 303, FED. R. EVID., *in* STEVEN GOODE & OLIN GUY WELLBORN, COURTROOM EVIDENCE HANDBOOK: 2013–2014 STUDENT EDITION 70 (2013). Rule 303 first surfaced in a preliminary form in 1969 and progressed in fits and starts along a torturous, controversial route until it evolved into its present form, which was never enacted by Congress. *See* 21B FED. PRAC. & PROC. EVID., *supra* note 147, § 5141 (describing in detail the excruciating history of Rule 303). Today the rule is referred to as "Standard 303" and considered to be "useful as a statement of existing law." GRAHAM, *supra* note 161, § 303.4.

252. *See* Cnty. Court of Ulster Cnty. v. Allen, 442 U.S. 140, 164–65 (1979).

253. *Id.* at 147 n.4 (1979) (discussing appellate court's hypotheticals).

254. *Id.* at 155–56 n.14.

255. The Court said the appellate court's examples were "unconvincing even were that type of analysis appropriate," and in the next sentence said it "has never required that a presumption be accurate in every imaginable case." *Id.*

Part II, it is rare even for transfers that are clearly the result of exploitation to be prosecuted,[256] which is a primary reason for the presumption proposal. Second, in the remarkable event that the statute was applied in a case involving a purely innocent recipient of an elder's gift that met the statutory basic facts, the possibility of conviction would be almost nonexistent.

Suppose, hypothetically, a young low-income couple moves in next door to an elder who has substantial financial resources. The couple befriends the elder. They help her when she needs assistance and she appreciates it. An event occurs in the lives of the couple that puts them in dire straits and requires financial resources to resolve. The elder gives or loans the couple $2000 to address the issue.

It is improbable that such a transaction would lead to a criminal complaint and implausible that it could result in an arrest and conviction. If a complaint was made a quick investigation would result in a decision not to pursue the matter. If the complaint was pursued and resulted in a criminal prosecution, it is hard to imagine, absent other facts, jurors drawing the instructed inference of exploitation or returning a guilty verdict under these facts, especially since they would be told in clear terms that the presumption is permissive and that they could convict only if all of the evidence showed guilt beyond a reasonable doubt. If the rationality of the jurors was corrupted in some way, the conviction would not stand due to insufficient evidence.

In summary, this statutory presumption proposal is needed for both practical and policy reasons, is constitutionally sound, and would help law enforcement prosecute those who prey on vulnerable elders, with minimal chances of endangering the innocent.

CONCLUSION

> "I ask what will be the result of today's hearing. Others and I have been forced to settle with disappointment in the last 5 years. I often wonder if this will be another disappointment, and I will anxiously await the results."[257]

The quotation above came from a witness testifying in 2002 before a Special U.S. Senate Committee on Aging investigating financial elder exploitation. The accurate, disappointing answer to the witness's question about what would be the result of the hearing is, more than a decade later, "not much." Elder abuse of all types is common. This Article has focused on financial exploitation, showing that it is widespread and increasing and that instances of elder financial exploitation are notoriously underreported

256. *See supra* notes 115–133 and accompanying text.

257. *See Schemer, Scammers & Sweetheart Deals Hearing*, *supra* note 44, 20 (2002) (reproducing a comment from William Blevins, testifying about the financial exploitation of his elderly cousin).

and under-prosecuted. Nevertheless, little has been or is being done to improve the situation.

We need more information and understanding of the scope and nature of elder abuse issues and in that regard the Elder Justice Act of 2010, devoted largely to studying the problem, was a good step.[258] As with many pervasive social ills, one large obstacle is a lack of resources. Experts agree that we need more and better trained people in just about every relevant area and at every level, including adult protective services, law enforcement, healthcare, and consumer protection to name a few. The numerous agencies charged with protecting elders must coordinate better.[259] The multifaceted nature of the issues requires multidisciplinary approaches, which have proven successful when implemented.[260]

But the resource issue is not going to go away and elders cannot wait another ten years while the federal government, academics, or others study the issue. Action is needed now.

One direct preventative measure would be universal mandatory reporting laws, requiring financial institutions to report to law enforcement elder fraud that they reasonably suspect. Most states have some type of elder abuse reporting statutes[261] and approximately half of states have mandatory reporting laws applicable to financial institutions.[262] Financial institutions are often in the best, most efficient position to detect and disrupt elder financial abuse because of their existing duties and safeguards to protect customers' assets, sophisticated technology for identifying patterns of fraud, and ability to train employees to spot exploitation.[263] Ideally, all fifty states would require mandatory reporting by financial institutions and, importantly, back up the duty with meaningful sanctions for failure to comply.[264] Other

258. *See supra* notes 16–17 and accompanying text (discussing the Elder Justice Act of 2010).

259. *See* Nerenberg, *supra* note 11, at 63 (noting that during roundtable discussions, federal agencies sharing responsibility for protecting elders cited as primary challenges the number of agencies involved and the lack of clarity in their roles and jurisdiction).

260. *See* Malks et al., *supra* note 222, at 56 (describing the Financial Abuse Specialist Team protocol in Santa Clara County, CA, a collaboration among four agencies to combat elder financial exploitation, and asserting that the Financial Abuse Specialist Team prevented or recovered more than $100 million in losses to elders from fraud).

261. LORI STIEGEL & ELLEN KLEM, ABA COMM'N ON LAW & AGING, REPORTING REQUIREMENTS: PROVISIONS AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE (2007) (organizing elder abuse reporting statutes by state).

262. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-208, SPECIAL COMMITTEE ON AGING: STRONGER FEDERAL LEADERSHIP COULD ENHANCE NATIONAL RESPONSE TO ELDER ABUSE 41–42 (2011) (listing twenty-four states that require financial institutions to report elder abuse).

263. BITS, BITS FRAUD PROTECTION TOOLKIT: PROTECTING THE ELDERLY AND VULNERABLE FROM FINANCIAL FRAUD AND EXPLOITATION 6 (2010) (explaining how financial institutions are in a unique position to detect elder fraud).

264. Some financial institution elder exploitation reporting statutes do include sanctions, but they are weak and sometimes apply only to willful violations. *See, e.g.*, CAL. WELF. & INST. CODE § 15630.1(f) (West 2012) (providing that failure by a financial institution to report elder financial

potential preventative measures include creating a registry of convicted elder predators, and enacting efficient procedures that allow law enforcement and adult protective services to quickly freeze the assets of suspected victims pending investigation.

This Article has concentrated on facilitating the prosecution of offenders after they are identified. Absent a meaningful threat of criminal prosecution, inadequate deterrence to the crime exists. Also, allowing elder predators to escape prosecution enables them to more easily commit similar crimes against others.

As explained, a principal obstacle to both initiating and successfully completing criminal prosecutions is the difficulty of proving that asset transfers from an elder to an exploiter were the result of exploitation rather than consensual loans or gifts, even in circumstances that raise a strong inference of exploitation. The permissive statutory presumption proposal in this Article would provide a tool to assist prosecutors in scaling that hurdle.[265] As detailed in Part III, such a presumption would be workable and constitutional.

Society is failing to protect one of our most precious and vulnerable resources from exploitation: the elders who nurtured, clothed, fed, taught, and raised us all. We cannot ignore them as "used up" or unneeded. We owe them all that we are. Not abandoning our elders to financial or other predators is a moral imperative. While much needs to be done, the statutory presumption proposal herein constitutes a feasible, economical, constitutional, available, and concrete step toward both providing justice for individual victims and deterring exploitation before it happens.

---

exploitation can result in a penalty not exceeding one thousand dollars and that willful failure to report can result in a penalty not exceeding five thousand dollars); COLO. REV. STAT. ANN. § 18-6.5-108(1)(c) (West 2013) (stating that a person who willfully violates the elder abuse reporting statute, which includes financial institutions within its scope, commits a Class 3 misdemeanor). The tort doctrine of negligence per se for statutory violations would arguably apply to facilitate civil liability of financial institutions for negligent breaches of statutory reporting duties. Elders are within the class of persons intended to be protected by such statutes and financial fraud is the kind of harm that the statutes are intended to prevent.

265. Other law enforcement tools are also needed, such as enhanced penalties for elder predation and an elder hearsay exception that would allow reliable out-of-court statements made by elders, such as sworn, recorded statements to law enforcement authorities, to be admitted as evidence if the elder dies or becomes incapacitated prior to trial. *See* Teresa B. Watson, Note, *Combating Crime Against the Elderly: Does the Public Interest Warrant a Special Hearsay Exception?*, 32 AM. J. TRIAL ADVOC. 585, 594 (2009) (asserting that "a special hearsay exception may be the most effective way to facilitate successful prosecution" of elder crimes). An elder hearsay exception, however, might not survive constitutional challenge. *See* Conner v. State, 748 So. 2d 950, 960 (Fla. 1999) (striking down Florida's hearsay exception for elders and disabled adults as violative of the Sixth Amendment Confrontation Clause despite the fact that the court previously upheld a similar hearsay exception for children under age eleven). The presumption proposal herein would help compensate for the lack of a elder hearsay exception by enabling prosecutions to proceed in many cases despite the unavailability of the victim due to death, incapacity, or unwillingness to cooperate.

***